THE

PROVINCIAL SMALL CAUSE COURTS ACT No. IX of 1887,

WITH

NOTES:

BY

P. C. SEN,

Author of the Annotated Editions of the Indian Penal Code, The Indian Evidence Act, Macnaghten's Principles of Hindu and Muhammadan Laws, &c., &c., &c.

Calcutta:

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PREFACE.

THE Hon'ble Mr. Scoble, during the passage of the Provincial Small Cause Court's Bill through the Legislative Council, observed—"the provisions of the original Act, XI of 1865, gave rise to a great deal of litigation in order to determine whether a suit was or was not of a nature cognizable by a Court of Small Causes. We have endeavoured for the future to avoid that difficulty by specifying in a Schedule the suits over which these Provincial Small Cause Courts shall not have jurisdiction, thereby giving jurisdiction in all cases which are not thus excepted". The Hon'ble Sir William Hunter also, said :—"The Bill clears away as far as possible the growth of conflicting decisions which have gradually overlaid the old law, and the causes of conflicts." The Hon'ble Mr. Ilbert in his Statement of Objects and Reasons for introducing the Bill wrote thus :—"It appears to the Government of India that the conflicting constructions placed on section 6, of which some are due to the progress of legislation during the last twenty years (I. L. R. 3 All. 66), render a more accurate definition necessary of the suits of which Courts of Small Causes may take cognizance, and that legislation to this end should follow sections 18 and 19 of the Presidency Small Cause Courts Act, 1882, in declaring the jurisdiction of those Courts to extend to all suits of a civil nature, subject to specified exceptions. This Bill has accordingly been prepared, its primary object being to remove the doubts now felt as to the effect of section 6, Act XI of 1865; and, as several sections and parts of sections of that Act have, from time to time, been repealed and other sections are obsolete as regards both expression and utility, it has been considered desirable to repeal the Act and re-enact the substance of the extant portions of it." We thus see that the present Act has been passed with the only object of consolidating and amending the law relating to Courts of Small Causes in the Mofussil.

The following are among the new provisions in, and changes by, the present Law :—

1. Written statements will be received from the parties *Vide* s. 26.

2. Deposit of the decretal amount must be made or security given to the satisfaction of the Court, before applying to set aside *ex parte* decrees or for a review of judgment.—*Vide* s. 17.

3. Application for review must be made within 15 days from the date of decree or order.—*Vide* s. 36.

4. Orders under any of the provisions of the Civil Procedure Code, imposing fines, or for the arrest or imprisonment of any person, except when such imprisonment is in execution of a decree, are made appealable.—*Vide* s. 24.

5. Suits for the recovery of damages on account of an alleged personal injury, if actual pecuniary damage resulted from the injury, were cognizable by the Small Cause Court, under Act XI of 1865, but Sch. II, Cl. 35, Sub-Clauses (b), (c), (d), (e), (k), and (l) of the present Act disallow such suits.

6. Suits for maintenance under special bond or other contract were cognizable under the old law, but Sch. II, cl. 38 of the present Act disallows jurisdiction in all sorts of suits relating to maintenance.

7. Suits for the rent of homestead lands were formerly cognizable, but are no more so under the present law.—*Vide* sch. II, cl. 8.

8. Suits for enforcement of lien on moveable property, and by pawners for the redemption or recovery of pledges, shall henceforth lie in the Small Cause Court; formerly they were not cognizable (*Vide* 16 W. R. 58; 9 W. R. 136; and I. L. R. 7 All. 855)

9. Suits for contribution excepting those mentioned in Sch. II, clauses 41 and 42, shall be cognizable by the Small Cause Court. Formerly, the Calcutta High Court held that suits for contribution generally were not cognizable by Courts of Small Causes (B. L. R, F. B, 675; and I. L. R, 10 Cal. 388), but the High Courts at Madras and Allahabad held them to be cognizable by those Courts (5 Mad. H. C. Rep. 200, and I. L. R., 3 All. 66). *Vide* also I. L. R., 7 All. 378.

10. All suits for personal property were cognizable under the old law, but suits for such as the plaintiff conveyed while insane shall not lie under the new.—*Vide* Sch. II, cl. 22.

11. Suits by a decree-holder to have the right of his judgment-debtor declared to moveable property of which the attachment has been raised, appear to be made cognizable by the new Act.*

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* The Select Committee in their Report (dated the 11th February 1887, published in the Gazette of India on the 26th February 1887 along with the new Act,) said, in p. 34, that they have, by their amendments placed, within the cognizance of Provincial Courts of Small Causes, "suits under Section 283 and Section 332 of the Code of Civil Procedure," which statement very likely appearing to them to be inaccurate, the said page of the Gazette was subsequently altered by omitting the words quoted above. Clause 19 of the Second Schedule which mentions all the kinds of suits excepted from the cognizance of Courts of Small Causes, is in the following words: "a suit for a declaratory decree, not being a suit instituted under s. 283 or 332 of the Code of Civil Procedure"; and cl. 20 of the same Schedule runs thus:—"a suit instituted under s. 283 or s. 332 of the Code of Civil

12. All suits for damages wherein the right of the plaintiff and the relief claimed by him depend upon the proof or disproof of a title to immoveable property or other title which a Small Cause Court cannot finally determine, shall not be tried by the said Court; *vide* s. 23. para. (1); e. g., (1) A digs a hole near the edge of his land, and causes B's ancient house to fall, B sues A for damages, the suit involves questions of *right of support*; the plaint may be returned by the Small Cause Court. (2) A digs in his own ground close beneath or close beside his neighbour's modern house, and occasions damage to the building. His neighbour brings a suit for damages on the ground of *lateral support*; the plaint may be returned by the Small Cause Court.

13. Suits for partition of moveable property appear to be cognizable by the S. C. Court. *Vide* Sch. II, Cl. 5.

It should be noted that suits against local † authorities do not come within any of the classes of suits excepted from the jurisdiction of the Small Cause Court.

My best acknowledgments are due to the authors of the works quoted in the following pages. My endeavour having been to supply information on those points which constantly arise in forensic practice, I have availed myself of their learning and philosophic reasoning to such an extent as to enable me to say that whatever merits this book might lay claim to belong entirely to their exertions, while I am responsible for all the defects and errors appearing in it; but, still, after the care and labor I have bestowed, I cannot help believing that I have produced a useful book.

SERAMPORE,
The 21*st July*, 1887.

P. C. SEN.

Procedure." It would appear from the terms of cl. 20, as if the saving in the foregoing clause were of no effect. But under the rules for the interpretation of Statutes, it will be found that "Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one. (*Per* Best, C. J. in Churchill *v.* Crease, 5 Bing. 180. And see ex. gr. Pilkington *v.* Cooke, 16 M. & W. 615; Taylor *v.* Oldham, 4 Ch. D. 395, 46 L. J. 105.) Even when the later, or later part of the enactment is in the negative, it is sometimes reconcileable with the earlier one by so treating it. If, for instance, an Act in one section authorised a corporation to sell a particular piece of land, and in another prohibited it to sell 'any land,' the first section would be treated not as repealed by the sweeping terms of the other, but as an exception to it (*Per* Romilly M. R. in De Winton *v.* Brecon, 28 L. J. Ch. 600.)"—*Vide Maxwell on the Interpretation of Statutes*, 2nd ed., p. 202.

† The words "local authority" mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund.—*The General Clauses Act I of* 1887, *s.* 3, *cl.* 6.

ERRATA.

In p. 26, line 13, after the word 'person' should be inserted the word 'bound.'

In p. 63, last line, for '18 W. R, 440' read 'Markby, §. 687.'

In p. 64. last line, for 'Markby, §. 687' read '18 W. R, 440.'

TABLE OF CASES CITED.

ACT NO. IX OF 1887.*

THE PROVINCIAL SMALL CAUSE COURTS ACT, 1887.

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* Passed by the Governor-General in Council and received the Governor-General's assent on the 24th February 1887.

CHAPTER III.

JURISDICTION OF COURTS OF SMALL CAUSES.

CHAPTER IV.

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CHAPTER V.

SUPPLEMENTAL PROVISIONS.

An Act to consolidate and amend the law relating to Courts of Small Causes established beyond the Presidency-towns.

WHEREAS it is expedient to consolidate and amend the law relating to Courts of Small Causes established beyond the local limits for the time being of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William in Bengal and at Madras and Bombay; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called the Provincial Small Cause Courts Act, 1887.

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of July, 1887.

Repeal.

2. (1) The enactments specified in the first schedule are repealed to the extent mentioned in the third column thereof.

(2) But all Courts constituted, limits fixed, places appointed, appointments, declarations and rules made, jurisdiction and powers conferred, forms prescribed, directions given and notifications published under Act No. XI of 1865 (*an Act to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature*), or under any enactment repealed by that Act, shall, so far as may be, be deemed to have been respectively constituted, fixed, appointed, made, conferred, prescribed, given and published under this Act.

(3) Any enactment or document referring to Act No. XI of 1865 or to any enactment thereby repealed shall, so far as may be, be construed to refer to this Act or to the corresponding portion thereof.

Savings.

3. Nothing in this Act shall be construed to affect—

(*a*) any proceedings before or after decree in any suit instituted before the commencement of this Act; or

(*b*) the jurisdiction of a Magistrate under any law for the time being in force with respect to debts or other claims of a civil nature, or of Village Munsifs or Village Panchayats under the provisions of the Madras Code, or of Village Munsifs under the Dekkhan Agriculturists' Relief Act, 1879; or

Note.

Cantonment Magistrates are generally invested with civil jurisdiction under Act III of 1859.

(*c*) any local law or any special law other than the Code of Civil Procedure.

Note.

Vide Army Act of 1881.

Definition.

4. In this Act, unless there is something repugnant in the subject or context, "Court of Small Causes" means a Court of Small Causes constituted under this Act, and includes any person exercising jurisdiction under this Act in any such Court.

Note.

See the General Clauses Act I of 1887.

CHAPTER II.

Constitution of Courts of Small Causes.

Establishment of Courts of Small Causes.

5. (1) The Local Government, with the previous sanction of the Governor General in Council, may, by order in writing, establish a Court of Small Causes at any place within the territories under its administration beyond the local limits for the time being of the ordinary original civil jurisdiction of a High Court of Judicature established in a Presidency town.

(2) The local limits of the jurisdiction of the Court of Small Causes shall be such as the Local Government may define, and the Court may be held at such place or places within those limits as the Local Government may appoint.

Judge.

6. (1) When a Court of Small Causes has been established, the Local Government shall, by order in writing, appoint a Judge of the Court.

(2) The Judge may be the Judge of one Court of Small Causes or of two or more such Courts, as the Local Government directs.

Appointment of times of sitting in certain circumstances.

7. (1) A Judge who is the Judge of two or more such Courts may, with the sanction of the District Court, fix the times at which he will sit in each of the Courts of which he is Judge.

Note.

The fixing of times of sitting by a Judge of more than one Court of Small Causes shall be subject to the sanction of the District Court.

(2) Notice of the times shall be published in such manner as the High Court from time to time directs.

Additional Judge.

8. (1) The Local Government, with the previous sanction of the Governor General in Council, may, by order in writing, appoint an Additional Judge of a Court of Small Causes or of two or more such Courts.

(2) The Additional Judge shall discharge such of the functions of the Judge of the Court or Courts as the Judge may assign to him, and in the discharge of those functions shall exercise the same powers as the Judge.

(3) The Judge may withdraw from the Additional Judge any business pending before him.

(4) WHEN the Judge is absent, the Additional Judge may discharge all or any of the functions of the Judge.

Suspension and removal of Judges.

9. A Judge or Additional Judge of a Court of Small Causes may be suspended or removed from office by the Local Government.

Power to require two judges to sit as a bench.

10. The Local Government, after consultation with the High Court, may, by order in writing, direct that two Judges of Courts of Small Causes, or a Judge and an Additional Judge of a Court of Small Causes, shall sit together for the trial of such class or classes of suits or applications cognizable by a Court of Small Causes as may be described in the order.

Decision in case heard by a bench.

11. (1) If two Judges, or a Judge and an Additional Judge, sitting together under the last foregoing section differ as to a question of law or usage having the force of law, or in construing a document the construction of which may affect the merits, they shall draw up and refer, for the decision of the High Court, a statement of the facts of the case and of the point on which they differ in opinion, and the provisions of Chapter XLVI of the Code of Civil Procedure shall apply to the reference.

(2) If they differ on any matter other than a matter specified in sub-section (1), the opinion of the Judge who is senior in respect of date of appointment as Judge of a Court of Small Causes, or, if one of them is an Additional Judge, then the opinion of the Judge sitting with him, shall prevail.

(3) For the purposes of sub-section (2), a Judge permanently appointed shall be deemed to be senior to an officiating Judge.

Registrar.

12. (1) The Local Government may appoint to a Court of Small Causes an officer to be called the Registrar of the Court.

(2) Where a Registrar is appointed, he shall be the chief ministerial officer of the Court.

(3) The Local Government may, by order in writing, confer upon a Registrar, within the local

limits of the jurisdiction of the Court, the jurisdiction of a Judge of a Court of Small Causes for the trial of suits of which the value does not exceed twenty rupees.

(4) The Registrar shall try such suits cognizable by him as the Judge may, by general or special order, direct.

(5) A Registrar may be suspended or removed from office by the Local Government.

Other ministerial officers.

13. Subject to any enactment for the time being in force and to any orders made by the Local Government in this behalf, the law or practice for the time being applicable to the appointment, punishment and transfer of ministerial officers of a Civil Court of the lowest grade, competent to try an original suit of the value of five thousand rupees in that portion of the territories administered by the Local Government in which a Court of Small Causes is established shall, so far as it can be made applicable, apply to the appointment, punishment and transfer of ministerial officers of the Court of Small Causes other than the Registrar, if any, of that Court.

Duties of ministerial officers.

14. (1) The ministerial officers of a Court of Small Causes shall, in addition to any duties mentioned in this Act, or in any other enactment for the time being in force, as duties which are or may be imposed on any of them, discharge such duties of a ministerial nature as the Judge directs.

(2) The High Court may make rules consistent with this Act, and with any other enactment for the time being in force, conferring and imposing on the ministerial officers of a Court of Small Causes such powers and duties as it thinks fit, and regulating the mode in which powers and duties so conferred and imposed are to be exercised and performed.

Note.

This section leaves unfettered the discretion of High Courts as to the powers and duties which may by rules under the section be conferred and imposed on ministerial officers of Courts of Small Causes.

CHAPTER III.

JURISDICTION OF COURTS OF SMALL CAUSES.

Cognizance of suits by Courts of Small Causes.

15. (1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

Note.

Suits or other proceedings against the Secretary of State for India in Council, or against any officer of the Government, in respect of any thing done by a Court receiving a deposit of rent under the Bengal Tenancy Act Sections 61-63, are not maintainable.

(3) Subject as aforesaid, the Local Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order.

Exclusive jurisdiction of Courts of Small Causes.

16. Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.

CHAPTER IV.

PRACTICE AND PROCEDURE.

Application of the Code of Civil Procedure.

17. (1) THE procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the second schedule to that Code, as amended by this Act, shall, so far as those chapters and sections are applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Note.

THE SECOND SCHEDULE

OF THE CODE OF CIVIL PROCEDURE IS AS FOLLOWS:—

Chapters and Sections of the Civil Procedure Code extending to Provincial Courts of Small Causes.

PRELIMINARY: Sections 1, 2, 3, and 5.

CHAPTER I.—Of the Jurisdiction of the Courts and *Res Judicata*, except section 11.

CHAPTER II.—Of the Place of Suing, except section 20, paragraph 4, and sections 22 to 24 (both inclusive).

CHAPTER III.—Of Parties and their Appearances, Applications, and Acts.

CHAPTER IV.—Of the Frame of the Suit, except section 42 and section 44, rule *a*.

CHAPTER V.—Of the Institution of Suits.

CHAPTER VI.—Of the Issue and Service of Summons, except section 77.

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CHAPTER X.—Of Discovery and the Admission, &c., of Documents.

CHAPTER XII.—Section 155, first paragraph, Judgment where either party fails to produce his evidence.

CHAPTER XIII.—Of Adjournments.
CHAPTER XIV.—Of the Summoning and Attendance of Witnesses.
CHAPTER XV.—Of the Hearing of the Suit and Examination of Witnesses, except sections 182 to 188 (both inclusive).
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CHAPTER XVII.—Of Judgment and Decree, except sections 204, 207, 211, 212, 213, 214, and 215.
CHAPTER XVIII.—Sections 220, 221, 222, of Costs.
CHAPTER XIX.—Of the Execution of Decrees, sections 223 to 236 (both inclusive), 239 to 258 (both inclusive), 259 (except so far as relates to the recovery of wives), 266 (except so far as relates to immoveable property), 267 to 272 (both inclusive), 273 (so far as relates to decrees for moveable property), 275 to 283 (both inclusive), 284 (so far as relates to moveable property), 285, 286, 287, 288 289, 290, 291, 292, 293 (so far as relates to re-sales under 297), 294 to 303 (both inclusive), 328 to 333 (both inclusive, so far as relates to moveable property), 336 to 343 (both inclusive).
CHAPTER XX.—Section 360, Power to invest certain Courts with Insolvency-jurisdiction.
CHAPTER XXI.—Of the Death, Marriage, and Insolvency of Parties.
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CHAPTER XXXIII.—Interpleader.
CHAPTER XXXIV.—Of Arrest and Attachment before Judgment, except as regards immoveable property.
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CHAPTER XXXVII.—Reference to Arbitration, sections 506 to 526 (both inclusive).
CHAPTER XXXVIII.—Of Proceedings on agreement of Parties.
CHAPTER XLVI.—Reference to and Revision by High Court.
CHAPTER XLVII.—Of Review of Judgment, sections 623, 626 and 630.
CHAPTER XLIX.—Miscellaneous.

Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct.

Note.

Application for review of judgment must be made within 15 days from the date of decree or order—*vide* section 36. Sections 624, 625, 627, 628 and 629 of the Civil Procedure Code shall no longer apply to Small Cause Court Judgments. Applications for setting aside *ex parte* decrees may be made as before. But in both cases, the applicant shall have to either deposit in Court the decretal amount or to give security for the performance of the decree. Unless very great care is taken to serve the summons personally whenever practicable, and that leaving sufficient time for the defendant to appear, the new provision with regard to *ex parte* judgment-debtors will produce great hardship in most cases, although the last words

of the proviso "as the Court may direct" may appear to give discretionary power to the Judges. The Hon'ble Mr. Ilbert in his statement of Objects and Reasons says :—"As the law now stands, a person wishing to have a decree set aside may apply for (*a*) a new trial under section 21, Act XI of 1865, or (*b*) a review under Chapter XLVII of the Code (of Civil Procedure), or (*c*) both a new trial and a review. 'It is difficult,' as observed by the learned Chief Justice of the High Court at Fort William, 'to conceive any reasons which would justify a new trial which would not also afford good grounds for a review' (I. L. R. 6 Cal. 238). It is proposed, therefore, to replace the alternative or cumulative remedies of new trial and review by the single remedy of review, but to impose on applications for review restrictions similar to those imposed by the existing law on applications for new trial."

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realized in manner provided by section 253 of the Code of Civil Procedure.

Note.

Section 253 of the Code of Civil Procedure is as follows :—

Decree against Surety.

"Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant.

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

Trial of suits by Registrar.

18. (1) Suits cognizable by the Registrar under section 12, sub-sections (3) and (4), shall be tried by him, and decrees passed therein shall be executed by him, in like manner in all respects as the Judge might try the suits, and execute the decrees, respectively.

Note.

Sub-section 3 of section 12 runs as follows :—

"The Local Government may, by order in writing, confer

upon a Registrar, within the local limits of the jurisdiction of the Court, the jurisdiction of a Judge of a Court of Small Causes for the trial of suits of which the value does not exceed twenty rupees."

Sub-section 4 of section 12 is as follows:—

"The Registrar shall try such suits cognizable by him as the Judge may, by general or special order, direct."

(2) The Judge may transfer to his own file, or to that of the Additional Judge if an Additional Judge has been appointed, any suit or other proceeding pending on the file of the Registrar.

Admission, return and rejection of plaints by Registrar.

19. (1) When the Judge of a Court of Small Causes is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may admit a plaint, or return or reject a plaint for any reason for which the Judge might return or reject it.

(2) The Judge may, of his own motion or on the application of a party, return or reject a plaint which has been admitted by the Registrar, or. admit a plaint which has been returned or rejected by him:

Provided that, where a party applies for the return or rejection or the admission of a plaint under this sub-section, and his application is not made at the first sitting of the Judge after the day on which the Registrar admitted, or returned or rejected, the plaint, the Judge shall dismiss the application unless the applicant satisfies him that there was sufficient cause for not making the application at that sitting.

Passing of decrees by Registrar on confession.

20. (1) If, before the date appointed for the hearing of a suit, the defendant or his agent duly authorised in that behalf appears before the Registrar and admits the plaintiff's claim, the Registrar may, if the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also

absent, pass against the defendant, upon the admission, a decree which shall have the same effect as a decree passed by the Judge.

(2) Where a decree has been passed by the Registrar under sub-section (1), the Judge may grant an application for review of judgment, and re-hear the suit, on the same conditions, on the same grounds and in the same manner as if the decree had been passed by himself.

Execution of decrees by Registrar.

21. (1) If the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may, subject to any instructions which he may have received from the Judge or, with respect to decrees or orders made by an Additional Judge, from the Additional Judge, make any orders in respect of applications for the execution of decrees and orders made by the Court of which he is Registrar, or sent to that Court for execution, which the Judge might make under this Act.

(2) The Judge, in the case of any decree or order with respect to the execution of which the Registrar has made an order under sub-section (1), or the Additional Judge, in the case of any such decree or order which has been made by himself and with respect to which proceedings have not been taken by the Judge under this sub-section, may, of his own motion, or on application made by a party within fifteen days from the date of the order of the Registrar or of the execution of any process issued in pursuance of that order, reverse or modify the order.

(3) The period of fifteen days mentioned in sub-section (2) shall be computed in accordance with the provisions of the Indian Limitation Act, 1877,

as though the application of the party were an application for review of judgment.

Note.

Section 5 of the Indian Limitation Act is as follows:—

"If the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal, or application, may be instituted, presented, or made on the day that the Court re-opens.

Proviso where Court is closed when period expires.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period."

Proviso as to appeals and applications for review.

22. When the Judge of a Court of Small Causes is absent and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar or other chief ministerial officer of the Court may exercise from time to time the power which the Court possesses of adjourning the hearing of any suit or other proceeding, and fix a day for the further hearing thereof.

Adjournment of cases by chief ministerial officer.

23. (1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immoveable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

Return of plaints in suits involving questions of title.

Note.

This provision is new and the Select Committee say, that it is based on suggestions made by several Judges of experience in different parts of the country. Under the former Act,

it was *held* that the mere denial of the plaintiff's title on the part of the defendant is not sufficient to oust the jurisdiction of the Court to hear the case. It is for the Judge to consider whether a *bona-fide* question of right, which is not within the jurisdiction of the Court to decide, is fairly raised in the suit, and when that reasonably appears, and not before, his jurisdiction ceases.—*Subbiramaniya Aiyar* v. *Velayudu Devar*, 1 Mad. 212; *Ammalu Amal* v. *Subba Vadiyar*, 2 Mad. 184; *D. Venkatachalam* v. *Thimna Naikan*, 5 Mad. 64. In the case of Manappa Mudali *v.* S. T. McCarthy (I. L. R., 3 Mad. 200), Turner, C. J., observed as follows :—"As to the course which should be pursued by a Small Cause Court or by a Court trying a suit of the nature cognizable by a Court of Small Causes, if it appears a *bona-fide* question of title arises which the Court can in that suit determine only incidentally, the Court cannot, as I have said decline jurisdiction."

A suit against the undivided sons of a deceased Hindu father to enforce payment of a debt incurred by the latter is within the jurisdiction of a Small Cause Court, and that jurisdiction is not ousted by a plea that the debt was contracted for immoral purposes.—I. L. R., 4 Mad. 236, Gopal Kristna Sastri *v.* Ramayyangar.

(2) When a Court returns a plaint under sub-section (1), it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877, be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction.

Note.

The second para of section 57 of the Code of Civil Procedure is as follows :—

Procedure on returning a plaint.

"On returning a plaint the Judge shall, with his own hand, endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reason for returning it."

Appeals from certain orders of Courts of Small Causes.

24. Where an order specified in section 588, clause (29), of the Code of Civil Procedure is made by a Court of Small Causes, an appeal therefrom shall lie to the District Court.

Note.

Clause 29 of section 588 of the Code of Civil Procedure is as follows :—

"Orders under any of the provisions of this Code, imposing fines, or for the arrest or imprisonment of any person, except when such imprisonment is in execution of a decree."

Revision of decrees and orders of Courts of Small Causes.

25. The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

Note.

The Select Committee in their report say as follows :—

"The opinion appears to be universal that the ruling of the Privy Council in Amir Hassan Khan *versus* Sheo Baksh Singh (I. L. R. 11 Cal. 6) has rendered it absolutely necessary to extend the jurisdiction which the High Courts possess over the judicial proceedings of Courts of Small Causes and of other Courts invested with their powers. It is of course desirable that nothing should be done to encourage needless resort to the High Court, but, as the Hon'ble the Chief Justice and Judges of the High Court at Fort William have observed, this consideration should be one rather for the High Court than to be used to remove an important branch of the lower judicature from all control and so to deprive it of the advantage of a subordinate relation to that authority which exists for the express purpose of guiding the inferior tribunals by its exposition of the law."

Amendment of the second schedule to the Code of Civil Procedure.

26. In the second schedule to the Code of Civil Procedure—

(*a*) for "CHAPTER VIII.—Section 111, Set-off"—the following shall be substituted, namely :—

"CHAPTER VIII.—Of Written Statements and Set-off;"

(*b*) the following shall be inserted between the portion of the schedule referring to CHAPTER XV and that referring to CHAPTER XVII, namely:—

"CHAPTER XVI.—Of Affidavits";

(*c*) in the particulars against CHAPTER XIX, for "275 to 280 (both inclusive), 283" the following shall be substituted, namely;—

"275 to 283 (both inclusive)";

(*d*) for "CHAPTER XLVII.—Of Review of judgment" the following shall be substituted, namely:—

"CHAPTER XLVII.—Of Review of Judgment, sections 623, 626 and 630"; and

(*e*) for "CHAPTER XLIX.—Miscellaneous, sections 640 to 647 (both inclusive), sections 649 to 652 (both inclusive)" the following shall be substituted, namely:—

"CHAPTER XLIX.—Miscellaneous."

Finality of decrees and orders.

27. Save as provided by this Act a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final.

CHAPTER V.

SUPPLEMENTAL PROVISIONS.

Subordination of Courts of Small Causes.

28. (1) A Court of Small Causes shall be subject to the administrative control of the District Court and to the superintendence of the High Court, and shall—

(*a*) keep such registers, books and accounts as the High Court from time to time prescribes, and

(*b*) comply with such requisitions as may be made by the District Court, the High Court or the Local Government for records, returns and statements in such form and manner as the authority making the requisition directs.

(2) The relation of the District Court to a Court of Small Causes, with respect to administrative control, shall be the same as that of the District Court to a Civil Court of the lowest grade competent to try an original suit of the value of five thousand rupees in that portion of the territories administered by the Local Government in which the Court of Small Causes is established.

Seal.

29. A Court of Small Causes shall use a seal of such form and dimensions as are prescribed by the Local Government.

Abolition of Courts of Small Causes.

30. The Local Government may, by order in writing, abolish a Court of Small Causes.

Saving of power to appoint Judge of Court of Small Causes to other office.

31. (1) Nothing in this Act shall be construed to prevent the Local Government from appointing a person who is a Judge or Additional Judge of a Court of Small Causes to be also a Judge of any other Civil Court or to be a Magistrate of any class or to hold any other public office.

(2) When a Judge or Additional Judge is so appointed, the ministerial officers of his Court shall, subject to any rules which the Local Government may make in this behalf, be deemed to be ministerial officers appointed to aid him in the discharge of the duties of the other office.

Application of Act to Courts invested with jurisdiction of Court of Small Causes.

32. (1) So much of Chapters III and IV as relates to—

(*a*) the nature of the suits cognizable by Courts of Small Causes,

(*b*) the exclusion of the jurisdiction of other Courts in those suits,

(*c*) the practice and procedure of Courts of Small Causes,

(*d*) appeal from certain orders of those Courts and revision of cases decided by them, and

(*e*) the finality of their decrees and orders subject to such appeal and revision as are provided by this Act,

applies to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts.

(2) Nothing in sub-section (1) with respect to Courts invested with the jurisdiction of a Court of Small Causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction.

Application of Act and Code to Court so invested as to two Courts.

33. A Court invested with the jurisdiction of a Court of Small Causes, with respect to the exercise of that jurisdiction, and the same Court, with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the Code of Civil Procedure, be deemed to be different Courts.

Modification of Code as so applied.

34. Notwithstanding anything in the last two foregoing sections,—

(*a*) when, in exercise of the jurisdiction of a Court of Small Causes, a Court invested with that jurisdiction sends a decree for execution to itself as a Court having juris-

diction in suits of a civil nature which are not cognizable by a Court of Small Causes, or

(*b*) when a Court, in the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, sends a decree for execution to itself as a Court invested with the jurisdiction of a Court of Small Causes,—

the documents mentioned in section 224 of the Code of Civil Procedure shall not be sent with the decree unless in any case the Court, by order in writing, requires them to be sent.

Note.

Section 224 of the Code of Civil Procedure is as follows:—

"The Court sending a decree for execution under section 223 shall send

(*a*) a copy of the decree;

Procedure when Court desires that its own decree shall be executed by another Court.

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

(*c*) a copy of any order for the execution of the decre, and if no such order has been made, a certificate to that effect.

This section was suggested by the case of Dharamdas Santidas *versus* Vaman Gobind (I. L. R., 9 Bom. 237), in wich it was *held* "that, as ruled in Bhagvan Dayalji *v.* Balu (I. L. R., 8 Bom. 230), a Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Code of Civil Procedure. This

governs his proceedings both in trial and execution, whether the suit is a Small Cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally, are locally co-extensive, there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a Small Cause should not generally be executed on property beyond the Small Cause jurisdiction without a transfer, *i. e.*, a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court."

Continuance of proceedings of abolished Courts.

35. (1) Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the Code of Civil Procedure, as extended to Courts of Small Causes, or in any other enactment for the time being in force.

Amendment of Indian Limitation Act.

36. In the third division of the second schedule to the Indian Limitation Act, 1877,—

(*a*) after No. 160 the following shall be inserted, namely:—

"160A. For a review of judgment by a Provincial Court of Small Causes, or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction.	Ditto ...	The date of the decree or order."

and (*b*) in No. 173, the words, figures and letter "No. 160A and" shall be inserted before the word and figures "No. 162."

Publication of certain orders.

37. All orders required by this Act to be made in writing by the Local Government shall be published in the official Gazette.

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

(See section 2.)

Number and year.	Subject or title.	Extent of repeal.
1	2	3
Act XI of 1865.	Mufassal Small Cause Courts Act.	So much as has not been repealed.
Act VI of 1871.	Bengal Civil Courts Act.	Section 30.
Act III of 1873.	Madras Civil Courts Act.	Section 29, paragraph one.
Act XV of 1874.	Laws Local Extent Act.	So much of the first schedule as relates to Acts XI of 1865 and X of 1867.
Act XII of 1881.	North-Western Provinces Rent Act.	In section 2, the words and figures "and Act No. XI of 1865, section 52."
Regulation I of 1877.	Ajmere Courts Regulation.	Section 33.

THE SECOND SCHEDULE.

SUITS EXCEPTED FROM THE COGNIZANCE OF A COURT OF SMALL CAUSES.

(*See section* 15.)

(1) A suit concerning an act or order purporting to be done or made by the Governor General in Council or a local Government, or by the Governor General or a Governor, or by a member of the Council of the Governor General or of the Governor of Madras or Bombay, in his official capacity, or concerning an act purporting to be done by any person by order of the Governor General in Council or a Local Government;

(2) a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office;

(3) a suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity, or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office.

Note.

A Magistrate is liable to be sued in the Civil Court in respect of an *illegal* order made by him under the Nuisance Chapter of the Criminal Procedure Code, and to be restrained by injunction from carrying it out (4 Bom. H. C. Rep. 150. Ashburner *versus* Keshab Valad.) *Vide* 19 W. R., 426, Gooroo Prosad Roy *versus* Probhoo Ram Chatterjee.

(4) a suit for the possession of immoveable property or for the recovery of an interest* in such property.

* The word "Interest" has been defined by *Tomlins as* "a legal term applied to any inferior estate in land, or connected with it as a lease, or mortgage; it is mentioned in contradistinction to 'estate,' which is significative of the entirety. It is a redundancy of expression to repeat in deeds 'all the estate, right,

Note.

This clause will exclude the following among other suits :–

(*a*) Suits under the Specific Relief Act, 1877, s. 9., to recover possession of immoveable property.*

(*b*) Suits to enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract. *See section 214 of the Civil Procedure Code.*†

(*c*) Suits by a party bound by an award under Bengal Regulations VII of 1822, IX of 1825 and IX of 1833 to recover any property comprised therein.‡

(*d*) Suits by any person by an order respecting the possession of property made under the Code of Criminal Procedure, chapter XL., or the Bombay Mamlatdars' Courts Act or by any one claiming

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title, *interest*, claim &c, as the greater interest would, of course, include the lesser." But the meaning of the Indian Legislature can be well gathered from the use of the term in some of its Acts: e. g., s. 10 of Act X of 1870 runs thus :—"The Collector may also require any such person to deliver to him a statement containing, so far as may be practicable, the name of every other person possessing any *interest* in the land or any part thereof as *co-proprietor, sub-proprietor, mortgagee, tenant* or *otherwise*, and of the nature of such *interest*, and of the *rents* and *profits* (if any) received or receivable on account *thereof* &c. &c."

* A landlord ejecting a *tenant*, of his own authority, after the expiry of the term of the lease may be sued under s. 9, Act I of 1877. (Jonardon *versus* Haradhun, 9 W. R., 513, F. B.) But an owner of land returning upon his own property cannot be so sued by an *agent*, who had been put into possession on behalf of such owner. (Madhub *versus* Sham, I. L. R, 3 Cal. 243). *Partial* dispossession of a house, well, &c., is dispossession, within the meaning of S. 9, Specific Relief Act. (Sabapatti *versus* Subrya, I. L. R. 3 Mad. 251.) The occupation of a casual tresspasser is not possession. If such a tresspasser is immediately ejected, he cannot sue under S. 9, Act I of 1877.

† A right of pre-emption, founded on the Muhammadan Law, does not attach to a lease, whether permanent or temporary (Babooram *versus* Nursing, 25 W. R. 43); nor to a conditional sale until it is completed or rendered absolute (Gurudyal *versus* Tekuarain, 2 W. R., 215; Buksha *versus* Tofer, 20 W. R, 216); nor to property sold in *execution*, except as laid down in s. 310 of the Civil Procedure Code, (Abdool *versus* Khellat, 10 W. R., 165).

‡ These Regulations relate to the settlement of lands, &c., and empower the Revenue Authorities to take judicial cognizance of certain claims and disputes respecting lands, &c. A *thakbust*—survey—award relating to boundaries, in Bengal, is treated as an award under Reg. IX of 1825 (See Rajah Sahib Pershad *versus* Rajendra Kishore, 12 W. R, P. C., 6, 18). An award under these Regulations is an *adjudication* of some *dispute* after the parties have had notice of the proceedings (see 3 W. R., 7 & 11 W. R. 389; Thompson, p. 115.)

under such person, to recover the property comprised in such order.*

(*e*) Suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee, for a valuable consideration.†

(*f*) Suits instituted in a Court not established by Royal Charter by a mortgagee, for possession of immoveable property mortgaged ‡

(*g*) Suit by a purchaser at a private sale for possession of immoveable property sold when the vendor was out of possession at the date of the sale.

(*h*) Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.

(*i*) Suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land when the judgment-debtor was in possession at the date of the sale.

(*j*) Suit by a landlord to recover possession from a tenant.

(*k*) Suit by a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property.

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* Where the Magistrate is unable to satisfy himself as to which party is in possession or where he decides that neither party is in possession, and he *attaches* the property under s. 531 of Act of 1872, or s. 146 of Act X of 1882, his order is not "an order respecting the *possession* of property." (Akilandun *versus* Periasami, I. L. R., Mad 309). By an express provision of the Bombay Act V of 1864, the decision of the Mamlatdar is not conclusive as to the point of actual possession in any subsequent suit. But the decision of a Magistrate under the Code of Criminal Procedure is conclusive as to the possession (Lillu *versus* Annaji, I. L. R., 5 Bom, 387.)

† A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.—s.3. Act II of 1882. (The Indian Trusts Act.)

‡ There can be no two things more distinct or opposite than possession as *mortgagee*, and possession as *owner* of the estate. The recovery of possession by the mortgagee *as mortgagee* does not extinguish the incumbrance, whilst redemption by the mortgagor or foreclosure by the mortgagee undoubtedly has such effect (I. L. R., 6 All. p. 559.) When the mortgagee takes possession of the mortgaged property, not as owner after foreclosure, but *as mortgagee* under the terms of the deed of mortgage, he is *accountable* to the mortgagor for the profits which he receives. (22 W. R. 90-92.)

(*l*) Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.

(*m*) Suit for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.

(*n*) Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.

(*o*) Suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

(*p*) Any other suit for possession of immoveable property or any interest therein.*

(5) a suit for the partition of immoveable property;

(6) a suit by a mortgagee of immoveable property for the foreclosure of the mortgage or for the sale of the property, or by a mortgagor of immoveable property for the redemption of the mortgage;†

(7) a suit for the assessment, enhancement, abatement or apportionment of the rent of immoveable property;

(8) a suit for the recovery of rent, other than house-rent unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction with respect thereto;

(9) a suit concerning the liability of land to be assessed to land-revenue.

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* Where a person executes a conveyance of land not in his possession, and the deed of conveyance does not contain any specific agreement to put the vendee in possession, a suit by the vendee for possession against the (Vendor after he has recovered possession) is not a suit for the specific performance of a contract. (Sheo Pershad *versus* Udai, I. L. R. 2 All. 718.) The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits. Such an exclusive privilege being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.—I. L. R., 3 Mad. 467, Veresa *versus* Tatayya; *read* the learned judgment of Turner, C. J., in this case.

† See foot note‡ in the preceding page.

Note.

There is some difference of opinion as to whether the term 'rent-free' is equivalent to 'revenue-free.' Sir B. Peacock, C. J., Jackson and Macpherson, J. J., *held* that a 'rent-free' tenure granted by the zemindar was not 'revenue-free' within the meaning of Sec. 10, Reg XIX of 1793, and that such a tenure could not be resumed or assessed by the heir of the grantor or a purchaser from him by private sale of the zemindary. (Mahomed *versus* Asadunissa, 9 W. R. 1, F. B.) But in sec. 30, Act XVIII of 1873, and sec. 79, Act XIX of 1873, the Legislature uses the words "exempt from payment of *rent*" when it refers to the law of the old Regulations; and in Jaganath *versus* Prag Sing, Stuart, C. J., Pearson and and Oldfield, J. J., held, that a 'rent-free' tenure, the revenue of which the grantor took upon himself to pay, was void, and liable to resumption by the grantor's representatives, under sec. 10, Reg. XIX of 1793, and other Regulations and Acts. (I. L. R., 2 All. 365, F. B.) In this article "rent-free land" means a *lakheraj* holding, whether created before or after the 1st December 1790. (See Nobin *versus* Janokee, 2 W. R., Act X, 33; Kristo *versus* Joy, 3 W. R, 33.) For a review of the law relating to lakheraj tenures in the permanently settled provinces, see Nobokristo *versus* Koylas Chunder, 20 W. R., 459, P. C., and Koylas Bashini *versus* Gocoolmoni, I. L. R., 8 Cal. 230. For a summary of the rules of limitation applicable to suits for resumption or assessment under the Regulations and under Act XIV of 1859, see Thompson, 2nd Ed., pp. 205, 206, and 1 Hay, 26; 5 W. R. P. C., 1; 7 W. R. P. C., 21; 4 W. R. 53; Calc. Sud. Dew., 1855, p. 501, F. B., 1861, Vol. I., p. 151. Where no rent has ever been fixed on or paid for a tenure, and the holder has been in possession for more than twelve years after the right to assess accrued to the zemindar, he is entitled to hold rent-free. (Abhoy *versus* Kally, I. L. R., 5 Calc., 949; see p. 329.) This rule does not apply to a suit for *assessment* of rent where a *declaratory* decree for resumption has been obtained against the defendant (2 C. L. R., 569.) Ancient lakheraj tenures within an estate cannot now be resumed or assessed except by an auction-purchaser of the estate at a revenue-sale. Suits by such a purchaser and his representatives are barred if more than twelve years have elapsed from the date of the sale becoming final and conclusive. By Act XIV of 1859 and Act IX of 1871, it was provided that even as against an

auction-purchaser at such a sale, the lakherajdar would be protected if he proved a rent-free holding from the time of the Permanent settlement. This proviso is omitted in Act XV of 1877, probaly because such a rent-free holding is not an "encumbrance imposed *after* the time of Settlement" within the meaning of sec. 37, Act XI of 1859, and is not therefore liable to be avoided by an auction-purchaser. Notwithstanding the repeal of sec. 3, Cl. 3, Reg. II of 1805 by Act VIII of 1868 (see. I. L. R. 9 Calc. 416), in Koylas Bashinee's case (I. L. R., 8 Calc., 230), a Division Bench of the Calcutta High Court *held* that sixty years' possession as lakheraj would bar the auction-purchaser's suit for resumption or assessment of lakheraj tenures created after 1st December 1790. But tenures created by the old zemindar *after* the Permanent Settlement of the estate are, *without any restriction*, liable to be avoided, if only the suit is not barred by art. 121. In the permanently-settled districts, the right to resume or assess lakheraj land, not exceeding 100 bigahs, and held under an invalid grant of a date *preceding* the 1st December 1790, accrued to the original engager on the date of the Settlement. As to lakheraj lands, whether exceeding 100 bigahs or not, held under a grant of a date *subsequent* to the 1st of December 1790, the right to resume or assess also accrued to the original proprietor on the date of the Settlement, if the lakheraj holding was in existence on that date. Before Acts X and XIV of 1859 came into operation, such suits were governed only by the sixty years' rule laid down in Reg. II of 1805. The right to resume or assess lakheraj holdings, which have come into existence since the date of the Permanent Settlement, accrued to the original engager, or his representatives, on the dates on which the lakherajdars commenced to hold the lands as lakheraj. But an auction-purchaser of the estate at a revenue sale always gets a new start. See Gungadhur *versus* Satcowrie, Cal. Sud. Dew. Rep. for 1850, p. 501, F. B., in which it was decided, that, even as regards lakheraj grants made before 1790, the auction-purchaser's suit was not barred by limitation if brought within twelve years of his purchase. By the Act of 1859, this ruling was so far modified that *no* suit for resumption or assessment could be maintained if the lakherajdar proved that the land had been held rent-free from the period of the Permanent Settlement. The Right of Government to assess invalid lakheraj tenures exceeding 100 bigahs, and

held within the ambit of a permanently settled estate, under grants of dates preceding the 1st of December 1790, has long since been extinguished by the sixty years' limitation. If the zemindar is barred by limitation, a putnidar or durputnidar deriving his right to sue from the zemindar is also barred. (See 3 W. R., 33; 15 W. R., 436). If the general right of Government to assess lakheraj land within the ambit of a Khas Mehal is extinguished by limitation at the date of the settlement of the Khas Mehal, the person with whom the settlement is made can have no right to assess such land.—Tagore Law Lectures 1882, pages 613-615.

(10) a suit to restrain waste;

Note.

This clause excludes suits for *restraining* waste; and not for waste *already committed.* There is a distinction between this clause and clause 17. Under the latter clause, a plaintiff might obtain a perpetual injunction, but in spite of that, the defendant may commit waste, and render himself liable to a civil and criminal action, but the plaintiff may not get any remedy whatever for the loss sustained by him. Under such circumstances, a suit to *restrain* waste is the appropriate action; there the Court might take sufficient precaution to see that waste is not committed; because it is equitable to relieve a man from the necessity of bringing action after action for every violation of a common law right. But what is a *waste*? It is defined as "a spoil or destruction in corporeal hereditaments* to the disherision of him that hath the remainder or reversion in fee simple† or fee tail" (2 Bl. Comm. 281); or as "the destruction of such things on the land, by a tenant for life or for years, as are not included in its temporary profits" (2 Hilliard). It is said, "If the tenant for life or for years should by neglect or wantonness occasion

* Hereditament is a very comprehensive term, including whatever may be inherited, be it *corporeal* or *incorporeal, real* or *personal. Corporeal* hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of land. An *incorporeal* hereditament is a right issuing out of a thing corporeal, whether real or personal, or concerning or annexed to the same,—such as rights of way, advowsons, rights of common, annuities, &c.—TOMLIN.

† FEE-SIMPLE is a freehold estate of inheritance, absolute and unqualified, and stands at the head of estates as the highest in dignity and the most ample in extent; since every other kind of estate is derivable thereout, and mergeable therein.—*Wharton.* FEE-TAIL is an estate, inferior to that of *Fee-simple.*

any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, as by pulling down houses; suffering them to go to decay from the want of ordinary care; cutting the timber unnecessarily, opening mines, or changing one species of land into another, he becomes liable, in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed." A prominent species of waste is *the felling of timber*. It is said, that it is scarcely possible to estimate the injury, which the destruction of a few valuable timber trees, by a tenant for life, on a farm with a scanty stock of wood and timber, may occasion to the owner of the inheritance. In case of *lease*, creating the technical relation of landlord and tenant, express provision is not ordinarily made with reference to the timber; and it is to this class of cases that the general doctrines of waste are applicable. If, however, as is sometimes done, the timber is expressly included in a lease, the lessee may have an action of trespass against the lessor for felling the trees, and the lessor an action of waste against the lessee. And against a stranger, each may have his own appropriate action. If the trees are expressly excepted, the lessor may fell them, or sue the lessee for doing it, or maintain trespass against a stranger. In the absence of any express agreement or provision on the subject, a tenant has no right to cut down timber trees, especially if it is bad husbandry to do so, and there is no pretence of its being done for *estovers*. But he may cut *coppices* and under-woods, according to custom and at seasonable times. So the *thinnings* of fir-trees less than twenty years old belong to a tenant for life. *Timber* trees are those used for building, and the question is one of *local usage*. But it is also waste to cut those standing in defence of a house, though not timber; or to cut trees for fuel, where there is sufficient dead wood; or to *lop* timber trees, and thereby cause them to decay; or to cut down fruit trees in an orchard or garden. Where a tenant cuts trees, not for the purpose of preparing the land for cultivation, but for the profit to be derived from a sale, he is guilty of waste. So although a tenant for years may, from the commencement of his term gradually clear up the wood land and prepare it for cultivation; yet he will not be permitted, just before the expiration of his lease, to cut down timber, upon that pretext. The Courts will not restrain a purchaser from cutting timber upon the land, unless he does so to such an extent, as to

render the land an inadequate security for the unpaid purchase-money. But, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner would do, and sell the timber that grew on that part of the land; yet it is waste to cut down valuable trees for sale. It is waste to dig for clay, gravel, lime, stone, &c., except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or clay-pit. The removal of coarse bog-grass from a farm, which had usually been foddered on the farm, was held to be waste. So the impoverishment of fields, by constant tilling from year to year. Or suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence. But not converting meadow-land into pasture-land; unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry. Nor meadow or pasture into ploughland, or wood-land into a farm.

In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot. And, as in the case of land, waste may be committed by an unauthorized *change* in a building; thus it is waste to convert a dwelling into a store or warehouse, or a parlor into a stable. Or to convert two chambers into one, or one into two; or a hand-mill into a horse-mill. Or to pull down a house, though a new one be built, if smaller than the former. Or even to build a house where there was none before. Or take it down after it is built.

Waste may be either *voluntary* or *permissive*. Permissive waste consists chiefly in suffering buildings to decay. Where a lessee for years covenanted that the buildings which he should erect should at the expiration of the term, revert to the lessor "without damages of any kind except the natural wear of the same," and a building so erected was destroyed by means of the negligent acts of a third party; held, it was a waste, for which the tenant was responsible to the the lessor, and that the lessee or his assignee, in an action against the party guilty of the negligence, was entitled to recover the whole value of such building. It is held that a Court of equity will not interfere, to make a tenant for life liable in respect of permissive waste. And that an action on the case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair. In general, a tenant *by the curtesy* is liable for waste. Although

liability for waste is usually connected with *tenancy*, it is held that a tenant is responsible for waste, by whomsoever done. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrong-doer. The tenant, in this respect, is compared to a *common carrier*. A *guardian* has in some cases been held liable for waste. It has been held that one *tenant in common* may be liable to another for waste. A perpetual *curate* is liable to an action, at the suit of his successor, for dilapidations—2 Hilliard.

In the case of Kenny *v.* Ameerudin Mundal, decided by the Calcutta High Court on the 15th April 1862, Messrs. Trevor, Bayley and Steer, Judges, *held* that a farmer without express authority from the Zemindar, cannot sue a ryot for damages for the value of fruit-trees cut down by the ryot without the leave and license of the farmer. The learned Judges observed: "We do not think that, in the absence of express covenant under the custom of the country, the farmer is under that general legal obligation to see that the property is kept by the tenants in the same condition in which it was at the time of the commencement of the farm, so as to render him personally liable to the Zemindar for any injury which may have occurred, whether with or without his knowledge or consent. His liability is confined to his personal acts—those done by himself, or by the tenants with his sanction, injurious to the rights of ownership of the Zemindars. If, unknown to, or without the former's sanction, acts of voluntary waste, injurious to the Zemindar's right of ownership, are committed, the tenant is liable to the Zemindar or owner, who has, either during the currency of the farm notwithstanding the possession of the farmer, or afterwards, full power to assert his rights, and to obtain damages from the party infringing them." In the case of Shookadasoondery Dabea *v.* Suroop Shaik, decided by the Calcutta High Court, on the 15th April 1862, Messrs. Trevor, Bayley and Steer, Judges, *held* that the cutting down of trees by a tenant without the leave and license of the owner, is an act of voluntary waste rendering the tenant liable in an action for damages. The learned Judges observed: "The pottah granted to the defendant by the plaintiff recites that the tamarind trees were planted by the defendant; in renewing the defendant's lease, however, for ten years, nothing is specified regarding the power of dealing with the trees. That power was apparently left by the parties to be regulated by the Common Law of the country;

and as no special or particular local custom has been pleaded by the defendant in this case, the question before the Court must be determined by that Common Law. As the tamarind trees were in the nature of timber, the owership of them, when once planted by the tenant under the Common Law of the country belonged to the proprietor of the land on which they grew, *viz.*, to the plaintiff. It follows that the cutting of the trees down by the defendant, without the leave and license of the plaintiff, the owner of them, was an act of voluntary waste, rendering him liable in an action for damages; and the decision of the Judge of the Small Cause Court, awarding to plaintiff damages and costs, is quite correct."

With regard to acts of waste committed by Hindu female heirs, the following extract from Mayne's Hindu Law, section 555, will interest the reader:—"Of course an action against the heir in possession is only maintainable in respect of some act of hers which is injurious to the reversioner. Such acts are of two classes, *First*, those which diminish the value of the estate; *Second*, those which endanger the title of those next in succession.

First.—Under this head come all acts which answer to the description of waste, that is, an improper destruction or deterioration of the substance of the property. The right of those next in reversion to bring a suit to restrain such waste, was established, apparently for the first time, by an elaborate judgment of Sir Lawrence Peel, C. J., in 1851.* What will amount to waste, has never been discussed. Probably no assistance upon this point could be obtained from an examination of the Engish cases in regard to tenants for life. The female heir is, for all purposes of beneficial enjoyment, full and complete owner. She would, as I conceive, have a full right to cut timber, open mines and the like, provided she did so for the purpose of enjoying the estate, and not of injuring the reversion. As Sir Lawrence Peel said,* 'The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore, a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance, must show a case approaching to spoliation.' She must appear not merely to be using, but to be abusing, her estate. Therefore, specific acts of waste, or of mismanage-

* Hurry Doss *v.* Rungunmoney, Sev. 657.

ment, or other misconduct, must be alleged and proved. Unless this is done, the female heir can neither be prevented from getting the property into her possession, nor from retaining it in her hands, nor compelled to give security for it, nor can any orders be given her by anticipation as to the mode in which she is to use or invest it.* But where such a case is made out, the heiress will be restrained from the act complained of. In a very gross case, she may even be deprived of the management of the estate, and a receiver appointed. Not upon the ground that her act operates as a complete forfeiture, which lets in the next estate, and entitles the reversioner to sue for immediate possession, as if she were actually dead,† but upon the ground that she cannot be trusted to deal with the estate in a manner consistent with her limited rights in it.‡ In such a case the next heirs may be, but need not necessarily be, appointed the receivers, unless they appear to be the fittest persons to manage for the benefit of the estate§; and the Court will, unless perhaps in a case where the female has been guilty of criminal fraud, direct the whole proceeds to be paid over to her, and not merely an allowance for her maintenance.‖

(11) a suit for the determination or enforcement of any other right to or interest in immoveable property:

Note.

This clause will exclude the following among other suits.—

(*a*) Suit against Government to set aside any attachment, lease, or transfer of immoveable property

* *Hurrydass v. Uppoornah*, 6 M. I., A. 433; *Bindoo v. Bolie*, 1 Suth. 125; *Grose v. Amirtamayi*, 4 B. L. R. (O. C. J.) 1; S. C. 12 Suth. (A. O. J.) 13.

† *Per curiam*, *Rao Kurun v. Nawab Mahomed*, 14 M. I. A 198; S. C. 10 B. L. R. 1; *Kishnee v. Khealee*, 2 N. W. P. 424.

‡ *Nundlal v. Bolakee*, S. D. of 1854, 351; *Gouree Kantka v. Bhagobutty*, S. D. of 1858, 1103.

§ *Golukmonee v. Kishenpershaud*, S. D. of 1859, 210.

‖ *Nundlal v. Bolakee*, S. D. of 1854, p. 351; S. D. of 1859, 210, *Supra*, *Lodhoomona, v. Gunneschander*, S. D. of 1859, 436; *Koroona Moyee v. Govind, nath*, S. D. of 1859, 944; *Maharani v.* Nandopal, 1 B. L. R. (A. C. J.) 27; S. C. 10 Suth. 73; *Shamasoonduree v. Jamoona*, 24 Suth. 86.

by the revenue authorities for arrears of Government revenue* (See 14 W. R. 203.)

(*b*) Suit by a vendor of immoveable property to enforce his lien for unpaid purchase-money.†

(*c*) Suit to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a *patni taluk* or other saleable tenure sold for arrears of rent.‡

(*d*) Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan, who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her marriage§ (*See* I. L. R., 10 Cal., 324.)

(*e*) Suit by a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.

(*f*) Suit to enforce payment of money charged upon immoveable property; for instance, the allowance and fees respectively called *malikana* and *haqqs*.‖

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* Under the N. W. P. Land Revenue Act, the defaulter's patti or mahal may be attached and taken under direct management by Government. A share or *patti* of a *mahal* may also be transferred for a limited time to a solvent co-sharer in the *mahal*, on condition of his paying the arrear due from the *patti*. Under Beng. Regulation XXIX of 1814, when a Ghatwal becomes a defaulter, it is in the power of Government to make over his tenure to another person on the condition of making good the arrear due; or to transfer it or to dispose of it in some other form.

† The purchase-money is secured by the vendor's lien on the land sold. Even when the vendee has been in *possession* of the property as such, the vendor has an equitable lien on the property for the unpaid purchase-money. (Trimalarav *v.* Municipal Commissioners, I. L. R, 3 Bom., 172.)

‡ Encroachments on the taluk or estate by neighbouring zemindars may be treated by the auction purchaser as *incumbrances* (8 W. R, 62, 10 W. R. 15.) An *easement* created by the tenant is an *encumbrance* within the meaning of the Bengal Tenancy Act, 1885, s. 161. *See* Bengal Tenancy Act, s. 167.

§ In the Punjab, Muhammadan widows succeed to their husband's lands when there are no descendants in the male line, for life, or till they marry again. As to the effect of the remarriage of Hindu widows, see sec. 2, Act XV of 1856. The cause of action for a declaration that the alienation is void *pro-tanto* is not revived in favour of reversioners who are born after the expiry of twelve years from the date of alienation (Pershad *v.* Chedeelall, 15 W. R., 1). On the *death* of the female, a separate cause of action for immediate *possession* of the property accrues to the reversioner (I. L. R, 4 Cal. 523).

‖ A *malikana* right is, generally, the right to receive from the Government a sum of money, which represents the *malik*'s share of the profits of an estate not permanently settled, when from his declining to pay the

(12) a suit for the possession of an hereditary* office or of an interest in such an office, including a suit to establish an exclusive or periodically recurring right to discharge the functions of an office;

Note.

The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant of the temple in the land belonging to the temple which he holds as remuneration for his service; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service—I. L. R., 6 Bom. 596, *Lotlikar* v. *Wagle.*

A claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honors at the hands of the members of the caste in virtue of such office is a caste question and not cognizable by a Civil Court (see Bom. Reg. II of 1827, sec. 21). Of course, if the office be one which enables the holder to render services to individual members of the caste, and the holder is actually employed to render those services, he may be entitled to recover in the Civil Courts remuneration for them; and in determining the amount, the fees customarily paid in the caste would, in the absence of special agreement, be properly taken as the basis for assessing it.—I. L. R., 6 Bom. 725, *Murari* v. *Suba.*

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revenue assessed by the Government, or from any other cause, his estate is taken into the *khas* possession of Government, or transferred to some farmer or ijaradar (*See* I. L. R. 10 Cal. 1112, 1125; 5 Cal. 921; 21 W. R, 88; 22 W. R., 551) *Haqqs* are fixed charges upon immoveable property, of which payment may be enforced by the sale of the property so charged. A zemindari due customarily payable on the sale of a house situated in the *mahal* is not a *haqq*. As to *Palki haks* and *Toda Goras haks* in the Bombay Presidency, see 14 Moore's I. A. 551; L. R., I. A. 34; 21 W. R. 178.

* The office of 'Karnam' was created for the discharge of *quasi*-public functions. When education was not general, the arts of writing and keeping accounts, like other crafts, were exercised by particular families, and so it came to pass that in very many places the office of 'Karnam' descended from father to son, and by custom became hereditary. Emoluments for the discharge of the duties of the office were provided either in the shape of land exempt from revenue or subject to a lighter assessment, or of fees in grain or cash or of both land and fees. See the judgments of the Full Bench of the Madras High Court in the case of Venkata *v.* Rama, I. L. R, 3 Mad. 249-276.

Under Bombay Act III of 1874 (the Hereditary Officers' Act), the Civil Courts cannot entertain a suit which seeks to recover damages against the defendant for wrongfully continuing in office as patel, instead of resigning in favor of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.—I. L. R., 6 Bom. 129, *Vasudev* v. *Ramchandra*.

A suit in a Civil Court by a hereditary *deshmukh* relating to a grant of land revenue is prohibited by the Pensions Act XXIII of 1871.—I. L. R., 6 Bom. 209, *Naro Damodar* v. *the Collector of Poona*.

(13) a suit to enforce payment of the allowance or fees respectively called *málikána** and *hakk* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immoveable property or in an hereditary office or in a shrine or other religious institution.

Note.

If a land-holder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court constituted under Act XI of 1865, has jurisdiction to decide a suit brought by the land-holder against the tenant to recover the amount so paid by the land-holder. Turner, C. J., in delivering judgment in the case of Venkatramaya *v.* Viraya, observed:—"Where water-cess is due, it may be recovered in the same manner as Government revenue, *i. e.*, the land may be sold and the rights of all parties other than the Government destroyed. The land-owner is therefore entitled to pay such cesses whether a personal liability for them has been contracted by his tenants or by himself, and if his tenants are liable to pay the cess, he is entitled to claim from them reimbursement in virtue of what is known as an implied contract. If the claim cannot be described as one founded on contract, it can be described as arising out of a right to compensation; in other words, it would be a claim for damages. The suit is cognizable on the Small Cause Court side of the Munsif's Court, and the Munsif should have determined whether or not the tenant was legally bound to pay in whole or in part

* See footnote marked ‖ in page 37.

the amount claimed and have passed a decree in accordance with his finding." I. L. R., 8, Mad. 4.

(14) a suit to recover from a person to whom compensation has been paid under the Land Acquisition Act, 1870, the whole or any part of the compensation.

Note.

The proprietors of lands or buildings are entitled to get compensation for any damage done to them by any officer of Government by digging the lands or breaking the houses or cutting any standing crop, fence or jungle for ascertaining whether they will suit the purpose for which the lands or buildings may be required by Government.—*Vide* s. 5., Act X of 1870. After acquisition of lands or buildings, compensation shall be paid for them by the Collector: But this payment shall not affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto—*Vide* s. 40, Act X of 1870.

(15) a suit for the specific performance or recission of a contract;

(16) a suit for the rectification or cancellation of an instrument;

(17) a suit to obtain an injunction;

Note.

This clause has reference to Chapter X of Act I of 1877 on Perpetual Injunctions. A perpetual injunction may be granted to prevent the breach of an obligation* existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of Act I, 1877, which relates to the Specific Performance

* Every Law (properly so called) is a *Command*. *Sanction* is evil, incurred, or to be incurred, by disobedience to Command. *Obligation* is liability to that evil, in the event of disobedience. Every Obligation or Duty is *positive or negative*. In other words, the party upon whom it is incumbent is commanded to do or perform, or is commanded to forbear or abstain. A duty to deliver goods agreeably to a contract, to pay damages in satisfaction of a wrong, or to yield the possession of land in pursuance of a judicial order, is a positive duty. A duty to abstain from killing, from taking the goods of another without his consent, or from entering his land without his licence, is a negative duty.—*Austin*.

of Contracts. When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) :—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trade-mark is property.

Illustrations.

(*a*) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(*b*) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owner may, sue for an injunction to prevent the breach.

(*c*) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(*d*) The directors of a fire and life-insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(*e*) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(*f*) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(*g*) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(*h*) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(*i*) A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(*j*) A, the owner of two adjoining houses, lets one to B, and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(*k*) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto, and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(*l*) A, B, and C, are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(*m*) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(*n*) A, B, and C are members of an undivided Hindu family. A cuts timber growing on the family-property, and threatens to destroy part of the family-house, and to sell some of the family-utensils. B and C may sue for an injunction to restrain him.

(*o*) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee, and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(*p*) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(*q*) A, in an administration-suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(*r*) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine, and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(*s*) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.

(*t*) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(*u*) A infringes B's patent. If the Court is satisfied that the patent is valid, and has been infringed, B may obtain an injunction to restrain the infringement.

(*v*) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(*w*) A improperly uses the trademark of B. B may obtain an injunction to restrain the user, provided that B's use of the trademark is honest.

(*x*) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(*y*) A, a very eminent man, writes letters on family-topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(*z*) A carries on a manufactory, and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival-manufacturer. A may sue for an injunction to restrain B from disclosing the process.

Mandatory injunctions.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations.

(*a*) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(*b*) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(*c*) In the case put as illustration (*i*) to section 54, the Court may also order all written communications made by B as patient to A, as medical adviser, to be destroyed.

(*d*) In the case put as illustration (*y*) to section 54, the Court may also order A's letters to be destroyed.

(*e*) A threatens to publish statements concerning B, which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(*f*) A, being B's medical adviser, threatens to publish B's written communications with him showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(*g*) In the cases put as illustrations (*v*) and (*w*) to section 54, and as illustrations (*e*) and (*f*) to this section, the Court may also order the copies produced by piracy, and the trademarks, statements, and communications, therein respectively mentioned, to be given up or destroyed.

(18) a suit relating to a trust, including a suit to make good out of the general estate of a deceased trustee, the loss occasioned by a breach of trust, and a suit by a co-trustee to enforce against the estate of a deceased trustee a claim for contribution ;

(19) a suit for a declaratory decree, not being a suit instituted under section 283 or section 332 of the Code of Civil Procedure ;

(20) a suit instituted under section 283 or section 332 of the Code of Civil Procedure ;

Note.

The suits referred to in this clause are of two* descriptions.—

(*a*) By a decree-holder to have the right of his judgment-debtor declared to property of which the attachment has been raised ; and

* The judgment-debtor also may institute a suit for establishing his right to property made over to a claimant of attached property.

(*b*) By the owner of attached property, after disallowance of his objection to the attachment, either against the decree-holder or an auction-purchaser, to recover the property.

The suits of the description under class (*a*) have not been excepted from the jurisdiction of the Small Cause Court —*Vide* Clause 19 of this Act.

(21) a suit to set aside an attachment by a Court or a revenue-authority, or a sale, mortgage, lease or other transfer by a Court, or a revenue authority or by a guardian;

(22) a suit for property which the plaintiff has conveyed while insane;

Note.

[So according to English law, a man or his representatives may show that when he made a contract, he was so lunatic, or *non compos mentis*, as not to know what he was about. But if a party relies on a deed on the ground that it was executed during a lucid interval, he must clearly show that this was the case. By Mahomedan law, also, a lunatic may contract in a lucid interval. Under what circumstances a Court of Equity will refuse to interfere to set aside deeds executed by a party alleged to be a lunatic, *see* Selby *v* Jackson. 13. L. J. Ch. 249.

In Hindu law the term 'insanity' comprehends, not only mad men and idiots, but also all those who labor under any species of fatuity, and who are naturally destitute of power to discriminate what may and may not be done.* And referring to Jagnyavalkya's opinion as to the causes of incapacity to contract, cited in the note to the preceding section, Jagannatha comments upon it thus: "Singly the gift of wages of a man possessing his senses is valid; joined with madness or the like, the intentional payment of wages during a lucid interval may also be valid; but singly a gift by a man affected by insanity or the like is void." From this comment the principle may be deduced that the act of a lunatic may be effectual if the contract be not onerous and the agreement rational, on the

* *Vide* 2 Bombay Rep. 114, in which the sale of a house at an inadequate price, by an aged, infirm, and foolishman, was set aside at the suit of his wife, although he was not proved to be an idiot.

presumption of the act having been done during a lucid interval; but that where it may be prejudicial to him, and unattended with any benefit, it should be held to be, *ipso-facto*, void.]—Sutherland's notes under S. 12 of the Indian Contract Act.

(23) a suit to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity;

(24) a suit to contest an award;

Note.

No suit lies to set aside an award under the Land Acquisition Act X of 1870—*vide* s. 58.

The following notes have been taken from Watson's valuable work on the Law of Arbitration and Awards:—

An arbitration award to bind the parties to the submission must, in the first place, be in pursuance of the submission; in the second place, it must be *certain*, *mutual*, and *final*; and, lastly, the thing awarded to be done must be advantageous to one party, must not be unreasonable or illegal, or impossible to be performed; although an award may, in some of these requisites, be deficient, yet such defect does not necessarily vitiate the whole award, but it may be bad for that part, and yet good for the residue, and a good award of all the matters submitted. The courts will intend everything to support awards, if possible; and will give effect to an award, if it can be done consistently with law. As to the certainty and conclusiveness of an award, the rule adopted by the courts in construing awards, is, that unless an award appears *not to be final or certain*, either on the face of the award or by averment, it is to be considered certain and final, although it may or may not be certain and final, according to extrinsic circumstances; as if costs be awarded to be paid in certain proportions, and that all sums already paid by the parties be taken into account, this award is either certain or not, as the sums paid are or are not certain, and the court will not intend that those sums are uncertain. This mode of construing awards is thus laid down by Lord Chancellor Eldon, "that it is extremely clear that every award must be certain and final; but it has, particulary in more modern times, been considered the duty of the court, in construing an award, to find that it is certain and final, instead of leaving to a

construction, which, in effect, would destroy nine-tenths of the awards made, and if possible to put one common sense on all terms. If there be an ambiguity in the words used in the award, it is said that such a construction will be given to them as will best coincide with the apparent intention of the arbitrators; and the courts will by intendment, restrain the general terms in an award to apply to particular words in the submission; so they will connect the particular thing awarded with the general words of the submission.

The power and authority of an arbitrator is derived entirely from the submission; he must therefore make his award strictly in pursuance and in conformity with the submission. It will be necessary to divide this branch of the subject into two heads: *first*, he must not, in his award, go beyond the submission, in things, in person, or in time, or exceed the power given to him by the submission in the particular case: *secondly*, the arbitrator must make his award of all things submitted to him. *First.*—An award that comprises anything beyond the submission will be void; at least for that part: and so it has been decided that in a submission of all personal actions, an award of a real action is void: and an award determining a matter where a party had only a *cause of action*, on a reference of all actions, would in like manner be void, not being warranted by the submission. So, where all actions, between A and B are submitted to arbitration, an award, embracing an action, in which A and his wife are parties on one side, and B on the other; or in which A *and others* are parties on one side, is bad. So, where a submission was of all causes of action, controversies, and demands between the *plaintiff and defendant*, the arbitrators awarded, "That the defendants had worked and gotten divers quantities of coal belonging to the plaintiff, *or to him, or some other person or persons*, in and under a certain estate," and then awarded a certain sum to be paid by the defendant, "as and for a compensation for all the coal gotten by him as aforesaid;" the Court of King's Bench held the award clearly bad, as extending to the claims of persons beyond the submission. But if two persons on one side, and one on the other, submit all disputes between them to arbitration (without saying between them *or either of them*), an award, that one of the two shall pay a sum of money to the opposite party, is good; for a submission of several persons of all matters in difference between them, imports a

submission of all matters that any one of them had against the others *jointly or severally*. So an award that a party to the submission, *his wife and heir apparent*, should make assurance of certain land is bad; for the wife and heir apparent are strangers to the submission. So an award that a stranger to the submission should be ready to seal and deliver fifteen bonds for the payment of a certain sum to one of the parties, is void. A general distinction is said to prevail between an award of an act to be done by a stranger, or an award of an act (as the payment of money) to be performed to a stranger: in the latter case it is said that the award is good. But an award that one party shall erect a stile on the land of a stranger is void. This distinction is very true, if it can be collected from the award that the money to be paid, or the act to be done to the stranger, is for the *use* or *benefit* of one party; for it has been decided frequently that an award is void, that one party shall pay money to a stranger, although he be attorney or banker of the other party, *unless it appear*, or can be intended to be for his benefit. But if it can be collected or intended from the award, that the stranger, to whom the money is to be paid, is a trustee for the other party, or that the money is to be paid to the stranger for the *use* of or *benefit* of the party, then the award is good. On a reference to arbitration of all matters in difference between the parties at the time of the submission, it is clear that an award of subjects of dispute, which have arisen at a period subsequent to the submission, would be void at least for the excess; as an award made on the 23rd of June, directing so much rent as would become due on the 24th, to be paid in satisfaction of a sum due by one party to the other, is void; for the rent may become extinct before that time, either by surrender or eviction.

It is a general rule, that unless the arbitrator makes his award of all matters submitted to him, the award is entirely void. Where the submission is of *several specific things*, if it do not appear that the arbitrator has made his award of each matter submitted to him, the award is void; and where an action containing two counts were referred, one on a promissory note, and the other on an account stated, an award that the plaintiff had good cause of action on the note was held bad, as not containing any adjudication on the second count. Where the submission

is, of all matters in difference, or of all disputes, without specifying them, the arbitrator need only make his award of such things, whereof he has notice; if there be other things in controversy not included in the award, but of which the arbitrator had not notice, yet the award is good.

Every award to be binding must be certain; for the object of the parties in submitting their disputes to arbitration is to make an end of litigation; if the award were uncertain, instead of putting an end to litigation, it would be only a fresh source of dispute between the parties. An award that one party shall pay the other for "certain task and day's work" was held bad for the uncertainty of what sum was due for task, and what, for day's work. So an award "that the defendant should deliver certain goods particularly named, and three boxes, and *several books*", without naming the books, was held to be uncertain and therefore bad. Everything is to be intended in favor of an award; and the courts will intend an award to be certain, unless it appears to be uncertain. An award that is conditional depending upon the performance or non-performance of a certain act, by the party who has to perform the thing awarded, is not so uncertain, as to vitiate the award.

An award must make a final end and determination of all matters contained in the submission; for that reason, if an award be not final, it will not be binding on the parties. For this reason it was formerly holden, that an award that one of the parties should be nonsuited, was void, not being final, for he might commence another action. An award that one party should give another a certain security for the payment of money, or for doing any other thing, is not liable to the objection of not being final. Any delegation or reservation of their authority, by arbitrators, will vitiate an award: for an award would not be final that left anything to the future judgment or power of the arbitrator, or of any other person. Or where part of the matter in dispute is excepted for future litigation, the award is not final. And where on a reference arising out of a dissolution of partnership, the arbitrator directed that a matter arising as to a liability on a promissory note should not be affected by the award, the award was held bad, as not being final.

Another rule respecting awards, is, that an award must be mutual, that is, that it must not be entirely of things to be

performed by one party, without such things being in satisfaction of the matters in difference. Whenever the arbitrator has omitted to decide on all the matters submitted to him, the award is not final or mutual, as the whole matters on both sides, have not been determined.

An award of something to be done which is *impossible, unreasonable,* or *illegal,* or of *no advantage to either party,* is bad. Thus, unless awarded in the alternative, where a party is awarded to do an act, which he has no power to perform, it is not obligatory upon him; as that one party shall deliver up a deed which is not in his custody or power; or that one shall procure a stranger to be bound with him; have been severally held to be bad awards, the thing awarded not being in the power of the party to perform; but if it be awarded that a person shall pay a sum of money, or enter satisfaction on a particular judgment, and there never was any such judgment, the award is good, for the party has the alternative to pay the money. An award must be *reasonable;* several instances will be found in the books, where awards have been held void for being unreasonable: whether an award be reasonable, or not, of course depends upon the particular circumstances of each individual case; the Courts, at the same time, must have a very strong case made out, before they will refuse to enforce an award for being unreasonable. Thus it has been decided that an award that one party shall give a horse, or release his right to certain land, in satisfaction of a trespass, or erect a stile on the land of another, is so unreasonable as not to be binding upon the party. So an award has been holden unreasonable, that one shall serve the other two years in satisfaction of an action. So an award that one party should pay the other 300*l.* to repair his honor, for calling him bankrupt knave, was considered unreasonable.

Acquiescence in the award, as taking a benefit under it, has been held to debar a party from moving to set aside an award.

The grounds upon which the Courts will set aside an award are,—*First.* The insufficiency of the award as that the award is not certain, final, or mutual, or that it does not embrace all matters submitted to the arbitrator. *Secondly,* A mistake in a point of law, or of fact, by the arbitrator, *apparent on the face of the award* or disclosed by some other authentic instrument. *Thirdly,* Any irregularity by

the arbitrators in their proceedings, as in the examination of the parties, or their witnesses, or in the want of notice to the parties of the meetings, &c. *Fourthly*, Corruption, or misbehaviour of the arbitrators. *Lastly*, The fraud, or concealment of evidence by the parties in obtaining the award. But the Courts never will enter into the merits on which the arbitrator has decided in making his award, otherwise all the objects of the reference would be lost, as in such case the Court would be merely a Court of appeal from the decision of arbitrators; and as it is said, if that were the case, no person would then take on him the duty of an arbitrator.

First.—It having been already fully stated, what awards are good, and what bad, it is unnecessary in this place to recapitulate the several grounds of insufficiency in awards, for which the Courts will set them aside, suffice it to say, that if an award be clearly bad, for matters apparent on the face of the award, or for matters extrinsic, as for not being certain, final, or mutual, or for an excess of authority in the arbitrator, or for the cause that all matters submitted have not been determined by the arbitrator, the Courts will set the award aside, in the whole, or in part, according to the circumstances of the case; but as we have seen, if the objections be on the face of the award, and the question, whether the award be good or not, be doubtful, the Courts will neither grant an attachment, nor set aside the award, but leave the parties to discuss the question of sufficiency of the award in an action, as objections on the face of the award are equally open to the defendant in an action for non-performance of an award.

The *second* ground above-mentioned, upon which the Courts will set aside an award, is a mistake either in fact or in law, by the arbitrator in making the award. Such mistake, however, to induce the Courts to set aside the award, *must appear on the face of it* or in some writing annexed to it, or in some writing of the arbitrator, for the Courts will not set aside an award, on the mere suggestion of a party, or on affidavits of alleged statements of the arbitrator, that the arbitrator is mistaken in his law. In one case, where the arbitrator, with his award, delivered a separate paper containing his reasons for the conclusion he had come to in making his award, the Court considering this as in effect a part of the award, set it aside, as on that paper it appeared, that there had been a mistake in point of law by the arbitrator.

The *third* ground above-mentioned, upon which the Courts will set aside an award, is any irregularity committed by the arbitrator, in hearing the evidence, or in not giving notice of the meetings; and for these irregularities, without any curruption or improper motive being imputed to the arbitrator, the Court will set aside an award. The Courts will also set aside awards where there has been any irregularity, as want of notice to the parties of the meetings, or a neglect or refusal to examine the witnesses. The arbitrator may, however, proceed *ex parte*, and make his award on *ex parte* evidence, if the parties do not attend, after regular notice of the meetings. If the arbitrator has either made his award without calling the parties before him, or without examining the witnesses, or has improperly examined them in the absence of the opposite party, the Courts hold this to be such improper conduct in the arbitrator as to induce them to set aside the award. As on a reference of an action for not repairing a house, and of all matters in difference, the arbitrator, on view of the premises, without calling the parties before him, made his award: the Court set aside the award, and Lord Ellenborough, C. J., observed.—"That though the premises might almost tell their own tale, yet there might be other facts which should be inquired into, such as payment by the party, or excuses for not repairing." So where an action as to the price of a phaeton was referred, and after inspecting the pheaton, the arbitrator said it was no use examining witnesses; and after hearing defendant's witnesses, and without hearing the plaintiff's witnesses, who were tendered for examination, the arbitrator made his award, the Court set aside the award. And the examination of one party, or of evidence on one side, in the absence of the opposite party has been considered to be a sufficient ground for the Courts to set aside an award.

The *fourth* ground above-mentioned upon which the Courts will set aside an award, is corruption or misbehavior of the arbitrator. It seldom, however, at this day occurs that actual corruption, or fraud, is to be found in the conduct of arbitrators. In one case, an award of excessive damages, was held to warrant an inference of partiality and corruption in the arbitrator.

The *last* ground above mentioned upon which the Courts will set aside an award is the concealment of evidence by the parties; in other words, the Courts will interfere in

cases where it appears that one party has obtained the award by fraud or concealment of material circumstances, such as would have altered the arbitrator's judgment. In every case, where the Courts for such fraud or concealment, have set aside awards, the arbitrator has himself made affidavit that if the matter concealed had been disclosed to him, it would have altered his opinion. An award will not be set aside, or referred back to the arbitrator, on the ground of the discovery of fresh evidence since the award, unless it be stated that it was evidence, which reasonable diligence could not have obtained, before the arbitrator made his award. —*See* Watson on Awards, third Edition Chapters VII—IX.

In the case of Dandekar *v.* Dandekars, I. L. R., 6 Bombay, 663, matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting the arbitrators all agreed, and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it. *Held* that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal award was a purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document, which formed the record of the award, was not fatal to the award. Amongst other matters the arbitrators were asked to make a division of certain fields to which the parties were equally entitled. The arbitrators decided the other matters, but as regards the fields said, that it was inconvenient to do so in consequence of the rains, and ordered the parties "to receive the profits half and half, and to pay the assessment half and half." *Held* that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award.

(25) a suit upon a foreign judgment as defined in the Code of Civil Procedure or upon a judgment obtained in British India ;

Note.

Section 2 of the Civil Procedure Code (Act XIV of 1882) has the following definitions :—

"Foreign Judgment" means the judgment of a foreign Court.

"Foreign Court" means a Court situate beyond the limits of British India, and not having authority in British India, nor established by the Governor-General in Council.

"Judgment" means the statement given by the Judge of the grounds of a decree or order.

Section 2 of the General Clauses Act I of 1868 has the following :—

"British India" shall mean the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., cap 106 *(An Act for the better Government of India)* other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.

Before the present Civil Procedure Code was enacted, Mr. Macpherson wrote :—"The exact weight due to foreign judgments whether as evidence or as a bar to the institution of a suit, may, perhaps, be considered as scarcely settled ; but the better opinion seems to be that foreign judgments must, in order to be received, finally determine the points in dispute, and must be adjudications upon the actual merits, and they are open to be impeached upon the ground that the foreign Court had no jurisdiction, whether over the cause, over the subject-matter, or over the parties, or that the defendant never was summoned to answer, or had no opportunity of making his defence, or that the judgment was fraudulently obtained. But where there is no tenable objection upon any of these grounds, the case ought not to be again investigated on its merits, for whatever constituted a defence in the foreign Court ought to have been pleaded there. To deprive a foreign judgment of effect on the ground of want of jurisdiction, it is necessary to show that the defendant was not a subject of the foreign State, or resident, or even present in it at the time when the proceedings were instituted ; and therefore that he could not be bound, by reason of allegiance or domicile, or temporary presence, by the decisions of its Courts ; and further that the defendant was not the owner of real property in such State, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent."

Section 14 of the Code of Civil Procedure enacts as follows:—

"No foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law, or of any law in force in British India:

(*c*) if it is, in the opinion of the Court before which it is produced, contrary to natural justice;

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India."

As regards suits by Aliens and by or against Foreign Native Rulers and execution in British India of decrees of Courts of Native States—*vide* Code of Civil Procedure, sections 430—434.

"A suit will not lie in the Courts of India upon the judgment of any Court in British India. The only exception to this rule is in the case of judgments of a Court of Small Causes on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property."—I. L. R., 6 Bom. 292, *Bhavanishankar* v. *Pursadri Kalidas* (*Vide* the judgment of Melvill., J., which is exhaustive on the subject of Foreign Judgments). According to the Madras High Court, a suit lies on all foreign judgments, including judgments of Courts of Native States. (I. L. R., 7 Mad. 164, *Sama* v. *Annamalai*). But, according to the Bombay High Court, judgments of Courts of Native States cannot be sued upon in British India (I. L. R., 8 Bom. 593, *Himmatlal* v. *Shivajiraj*).

(26) a suit to compel a refund of assets improperly distributed under section 295 of the Code of Civil Procedure.

(27) a suit under the Indian Succession Act, 1865, section 320 or section 321, or under the Probate and Administration Act, 1881, section 139 or section 140, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.

(28) a suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate;

(29) a suit—

(*a*) for a dissolution of partnership or for the winding-up of the business of a partnership after its disssolution;

(*b*) for an account of parnership-transactions; or

(*c*) for a balance of partnership-account, unless the balance has been struck by the parties or their agents;

(30) a suit for an account of property and for its due administration under decree;

(31) any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant;

(32) a suit for a general average loss or for salvage;

Note.

AVERAGE, in its strict sense, is a contribution made by the owners of a ship, and the proprietors of goods, to those whose goods are sacrificed or damaged in the preservation of such ship or cargo, or any part of the merchandize. It is sufficient, for the purposes of ordinary information, to state that the averages, which subject the whole of the ship and cargo to this contribution, are either *general* or *particular*. General, when the sacrifice is incurred to prevent a total loss of the ship. Particular, when the loss to ship or goods occurs on the ordinary incidents of a voyage, although they reach their destination; such as accidents to rigging, loss of anchors, &c; in which case the expenses or loss must be compensated by the parties not immediately concerned in the ship or cargo, *viz.*, the insurers. Particular average, or, as it is commercially termed, average loss, is to be considered only with reference to a particular partial loss, which, when applied to the ship,

means a damage sustained from some of the accidents assured against; and when referred to the cargo, has relation to the damage which the goods have suffered from storm, &c., though the whole or the greater part may arrive in port.—*Tomlin.*

SALVAGE is an allowance or compensation made to those by whose exertions ships or goods have been saved from the dangers of the seas, fire, pirates, or enemies.—*Wharton.*

Wrecks, in their legal acceptation, are at present not very frequent, for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, permitting the inhabitants to seize on whatever they could get as lawful prize; or as an author of their own expresses it, "*in naufragorum miseriâ et calamitate tanquam vultures ad prædam currere.*" For by the statute of 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is called *salvage*.—Blackstone, Vol. I. p., 285.

Section 70 of the Indian Contract Act is as follows:—

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations.

(*a*) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(*b*) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously."*

* The following sections of the Indian Contract Act IX of 1872 relate to finder of goods belonging to others:—

S. 71.—A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee. (*See* Chapter on Bailment).

(33) a suit for compensation in respect of collision between ships;

(34) a suit on a policy of insurance or for the recovery of any premium paid under any such policy;

(35) a suit for compensation—

(*a*) for loss occasioned by the death of a person caused by actionable wrong;

(*b*) for wrongful arrest, restraint or confinement;

Note.

"The distinction in respect to this injury is that the intention or motive is, (as an exception to the general rule), an essential ingredient in the wrong. Intention and motive are not identical: intention is the mental relation to the result aimed at by the act done; but motive begets the volition that intends such act. In criminal cases, intention and not mere motive is material; the two may often concur, and clear proof of the motive may often demonstrate the intention, but a commendable motive will not excuse an illegal intention. In civil cases intention may be immaterial, since the fact of a legal injury (or breach of right) of itself induces civil liability. But in all cases if a wrongful act is done intentionally, without just cause or excuse, this is a sufficient intent to injure and ground of liability, whether the motive that prompted such intent be good or bad. A malicious arrest consists in an abuse of legal process, maliciously and without reasonable or probable cause, resulting in depriving another of

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S. 168.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation: and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it. (*See* Storey on Bailments, § 121 a).

S. 169.—When a thing, which is commonly the subject of sale, is lost, if the owner cannot, with reasonable diligence, be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it.—

(1) when the thing is in danger of perishing or of losing the greater part of its value; or,

(2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.

As regards unclaimed property, and the duty of the Police and the Magistrate (*See* Sec. 25-27 of Act V of 1861.)

his liberty. There must, therefore, be both the abuse, and the hurtful consequence. On the one hand, an act not amounting to a legal injury, does not become so by being done with a bad motive or intent; and on the other, a mere intention, or even the endeavour, will not supply the want of the act; but where the direct and natural consequence—the arrest—has thus followed, it will be difficult to suggest, in any case, the absence of actual damage. Malice and want of reasonable and probable cause must co-exist; for if there was reasonable and probable cause for the arrest, it necessarily becomes legal, and so negatives illegality in the intent, however expressly malicious the motive which prompted the intent. But the value of motive as evidence of intention must not be overlooked: and from the want of reasonable and probable cause, malice may be inferred. A malicious arrest must be distinguished from a simply illegal arrest which constitutes a false imprisonment"—*Collett on Torts.* In the case of *Williams* v. *Smith* (10 C. B. N. S, 596), Williams, J., observed:—"If the attachment in this case had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both attorney and client would be liable for any imprisonment which took place under it."—*Vide* I. L. R, 9 Bom. 9, *Fisher* v. *Pearse.*

(*c*) for malicious prosecution;

Note.

[Malice is of two kinds, 'express malice' and 'malice in law.' Now 'express malice' need not necessarily be 'malice in law,' nor need 'malice in law' be 'express malice.' 'Express malice' too is what is popularly known as malice, and 'malice in law' is 'implied malice' as well as 'express malice,'—*i. e.*, where, from the circumstances of the case, the law will infer malice. The general presumption of law is in favor of innocence, but the law presumes every act in itself unlawful to have been wrongfully intended till the contrary appears. Lord Mansfield, in *Rex v. Woodfall* (5 Burn, 2667), laid down the distinction very clearly in those cases where a criminal intent must be proved and those where it will be presumed:—"Where an act in itself indifferent, if done with a particular intent, becomes criminal, the intent must be proved and found; but where

the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." The same presumption arises in civil actions, where the act complained of is unlawful. This means, that when the act complained of is in itself unlawful, the law will infer malice; when lawful, malice will have to be proved. In the leading case of *Bromage v. Prosser* (4 B & C., 247; S. C, 6 D. & R, 296), Bayley, J., said: "Malice, in the common acceptation, means ill will against a person; but, in its legal sense, it means a wrongful act done intentionally without just cause.....If I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend that the law recognizes the distinction between these two descriptions of malice—malice in fact, and malice in law—in actions of slander." In *Goutiere* v. *Robert, Charriol, and others* (All. H. C. Rep., 1870, p. 353) the Court said: "Malice, in its legal sense, is something less than malevolence or vindictive feeling. Acts done wrongfully and without reasonable and probable cause, and acts done vexatiously and for the purpose of annoyance, have been held by the law to be malicious." And they added, that the act must be done wrongfully, for if done in good faith, though a cautious person would have abstained from doing it, it is not malicious; but in the absence of such causes as would influence a man of ordinary caution, malice may be presumed at the option of the Court, the inference of malice not being compulsory upon the Court to draw, and being capable of being rebutted by good faith being shown. In *The Collector of Sea Customs, Madras*, v. *Punniar Chithambharam* (I. L. R., 1 Mad., 89), * * * Kinderseley, J., drew a distinction between 'express malice' and 'malice in law,' defining the former as an act done with ill will towards an individual, and the latter as a wrongful act done intentionally without just cause or excuse, following Bayley, J., in *Bromage* v. *Prosser*. It may be laid down, therefore, that when an act unlawful in itself is done intentionally without just cause or excuse, the law will infer malice. Practically speaking, in most

cases when the law requires malice to be shown, there will be abundant evidence of express malice; but the High Court, Allahabad, no doubt, laid down, that where express malice did not exist, the Court was not bound to infer malice from want of reasonable and probable cause. And this view is shared in by Madras High Court in *R. Ragunada Rai* v. *Nathamuni Thatha Nayyangar*, (6. Mad. H. C. Rep., 423), where they said: "The inference of malice in civil cases is a matter of fact, and the mere absence of reasonable and probable cause for an act does not justify the concluding as matter of law that the act is malicious." This shows that absence of reasonable and probable cause is not to be taken as identical with malice, though malice may, having regard to the circumstances of the case, be inferred from it. Circumstances may, no doubt, exist, where though the act was done without reasonable and probable cause, a Court would be justified in not inferring malice; though these cases would be comparatively rare. Between individuals, express malice will ordinarily be found to exist; but when it does not exist, or when the actions of public bodies or officers, especially judicial officers, are in question, very nice points may arise as to whether, under the circumstances, malice should be inferred from want of reasonable and probable cause or not. In most of these cases, the whole question will turn as the Madras High Court said in *The Hon'ble Goday Narayan Gajpati* v. *Sri Ankitam Venkata Garu* (6 Mad H. C. Rep., 85): "On the cogency of the inference to be derived from the absence of reasonable and probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible." In libel, if the fact of publishing the libel is proved, the law infers malice from such publication. Should the defendant then succeed in proving the publication to be privileged, unless express malice is alleged and proved, he has a good answer to the action; but if express malice is proved, the publication cannot be deemed to be privileged. See *Shepherd* v. *The Trustees of Bombay.* (I. L. R., 1 Bom., 477, *per* Green J.). Express malice is not necessarily malice in law: for instance, a prosecution set on foot with the most express malice, but with reasonable and probable cause,

would give no ground for an action to recover damages for malicious prosecution. Where the inference of malice is to be drawn from the want of reasonable and probable cause, there must be an utter absence of 'good faith.'] *Alexander's Indian Case-Law on Torts.*

"The difficulty of obtaining a clear idea of what is meant by the term 'malice' is also greatly increased by the use of the phrase 'malice in law.' If, for instance, I erroneously suspect you to be a thief, and I communicate my suspicions to another, not in any way intending to injure you, or thinking it likely that I shall injure you, but because I, erroneously, think it my duty to do so, there can, of course, be no malice in any reasonable sense of the word. And this is admitted in such cases by saying there is no 'malice in fact.' Nevertheless lawyers persist in such cases in saying that there is 'malice in law.' Obviously the state of the law which they approve, and which they wish to apply, is that I should be liable for the publication of statements injurious to the character of another, except in certain specified cases, of which that under consideration is *not* one. They desire that this obligation should be in no way dependent on my belief as to the truth of my statements, or on my desire or expectation that you may be injured by them. Nevertheless, the forms of procedure still assume the contrary; you are bound to state that I acted maliciously; and after it has been most carefully inquired into and ascertained that there was no malice in the matter, the judges still hold me liable by telling me that there was 'malice in law.' What, of course, this really means is, that there are circumstances under which I am liable for false statements affecting your character independently of malice; but it would be far better, and save endless confusion, if, instead of seeking to do this by interposing the phantom called 'malice in law,' we said plainly that no malice was necessary. To arrive at our point by this circuitous route is just as if the Court, desiring to relieve a debtor from the obligation to pay a debt, were to tell him he would be considered as having paid it if he sent his creditor a cheque drawn in full form on his bankers for no pounds, no shillings, and no pence." (1)

(1) 18 W. R., 440.

A person may prosecute another, either criminally or civilly. He may be actuated by the plainest malice but may nevertheless have a justifiable reason for the prosecution. Hence no one can be made liable for a mere malicious prosecution. The peculiar element in these cases is *the want of probable cause.* For the purpose of maintaining an action for malicious prosecution, "the plaintiff must allege and prove that *he has been prosecuted by the defendant,* either criminally or in a civil suit, and that *the prosecution is at an end;* that it was instituted *maliciously, and without probable cause;* and that *he has sustained damage thereby.*"* For bringing a malicious civil action, the defendant is generally charged only with the costs of the defendant. It has been held that "an action is not maintainable for *damages* occasioned by a civil action;" neither does a "suit lie to recover costs awarded by a Civil Court, though it *may lie for costs which could not be so awarded.*"† But an action will lie for a groundless and malicious petition to adjudge the plaintiff to be a bankrupt.‡ "It is said—'There are no cases in the old books, of actions for suing where the plaintiff had no cause of action; but of late years, when a man is maliciously held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due.' Thus an action lies for suing the plaintiff in an inferior Court, maliciously, and arresting him, when that Court had no jurisdiction of the cause or of suing in a proper Court, but proceeding there vexatiously. Also for alleging excessive damages, so that the defendant could not procure bail."§ In *Goutiere* v. *Robert, Charriol and others,*‖ it was held that proof of malice was essential to support a suit for damages for the wrongful suing out of mesne process. In Dhurmo Narayan Sahoo and others *v.* Sreemutty Dossee (1) it was held that where a Court had issued mesne process after being satisfied that the defendant was about to remove or dispose of his

* 1 Hilliard p. 480.
† I. L. R., 1 Bom. p. 467 (6. Mad. H. C. Rep, 192).
‡ 1, Hilliard p. 489.
§ 1, Hilliard, pp. 487—488.
‖ All. H. C. Rep, 1870, p. 353.
(1) Markby, § 687.

property with intent to obstruct or delay the execution of a decree which might be passed against him, it must be presumed that there was reasonable and probable cause for the plaintiff to have moved the Court to issue the mesne process even though the suit was eventually unsuccessful, and that unless the contrary was shown, damages could not be recovered.

"Although want of probable cause and malice must both *exist* in order to sustain this action; yet in reference to the *mode of proving* these respective facts, there is a material and well-established difference. The want of probable cause cannot be inferred from any degree of express malice; but malice may be implied from the want of probable cause, without proof of any angry feeling or vindictive motive. The distinction, however, is laid down, that, where there are no circumstances to rebut the presumption, that malice alone could have suggested the prosecution, malice may be inferred from the want of probable cause. Also, where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance. Malice, however, is in no case *a legal presumption* from the want of probable cause; it being for the jury to find from the facts proved, where there was no probable cause, whether there was malice or not. And it is further held, upon the same subject, that although, where one who has reasonable ground for belief of guilt institutes criminal proceedings against another, he is not liable in an action for malicious prosecution, whatever may have been his motives; yet, if he acts *rashly, wantonly,* or *wickedly,* the presumption of malice is conclusive, and he is responsible. 'The facts ought to satisfy any reasonable mind, that the accuser had no ground for the proceeding but his desire to injure the accused."*

The question of probable cause, in an action for malicious prosecution, is *a mixed question of law and fact.* Where the facts are uncontested, it is the duty of the Judge to apply the law and determine the issue. If there are contested facts, he should charge the jury hypothetically, upon the state of facts claimed by each party. It is said, 'In some cases the reasonableness and probability of the ground for the prosecution has depended not merely upon the proof of certain facts, but upon

* 1 Hilliard pp. 485-486.

the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these, and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, the Judge determining as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse.' In other words, whether the circumstances alleged, to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law."*

(*d*) for libel;

Note.

Vide notes under the following sub-clause (c) relating to 'Slander.'

Section 402 of the Code of Civil Procedure provides:—

"No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault."

As regards plaints in actions for libel, the Code of Civil Procedure has provided two forms: one for libel (the words being libellous in themselves), the other for libel (the words not being libellous in themselves).

The following extract from Blackstone† will interest the reader:—

"A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation, as by publishing of an attorney *ironically*,

* 1 Hilliard, pp. 504—505.

† Blackstone, Vol. III., p. 133.

that he was 'an honest lawyer.' With regard to libels in general, there are, as in many other cases, two remedies; one by indictment, and another by action. The former is for the *public* offence; for every libel has a tendency to a breach of the peace, by provoking the person libelled to break it. This offence was formerly the same (in point of law) whether the matter contained in the libel were true or false; and the defendant, on an indictment for publishing a libel, was therefore not allowed to allege the truth of it by way of justification. But the law in this respect was altered by the Stat. 6 and 7 Vict. C. 96., which enables the defendant to allege the truth of the matters charged, and that it was for the public benefit that they should be published. The truth of the libel may now therefore be inquired into at the trial, but does not amount to a defence, unless the publication was for the public benefit. And if, after such a plea being maintained, the defendant is convicted, the Court, may in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated thereby. In the remedy by civil action, which is to repair the *party* in damages for the injury done him, the defendant might always, on the other hand, as for words *spoken*, justify the truth of the facts, and show that the plaintiff had received no injury at all. And by the Statute I have just referred to, he is now enabled to give in evidence, in mitigation of damages, that he made or offered an apology before action, or as soon aferwards as he had an opportunity, in case the action was commenced before. To encourage a wholesome independence in the public press, the same Statute accords to a newspaper, or other periodical publication, the further privilege of pleading that the libel was inserted; without malice, and without negligence, and that before action, or at the earliest opportunity afterwards, a full apology was inserted; or if the paper be ordinarily published at intervals exceeding one week, that an offer had been made to publish the apology in any newspaper selected by the plaintiff. With such a plea money may be paid into Court by way of amends; and if the jury consider the sum sufficient, they must find their verdict for the defendant. What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon. But many words which, spoken merely, are not actionable, become so, if written. Thus to say of a man

that he is a swindler (unless in relation to his trade or business) is not actionable, whilst to print or write of him, that he is so, is actionable. For speaking the words 'rogue' and 'rascal' an action will not lie; but if these words are *written and published,* an action will lie. As to signs or pictures, it seems necessary always to show the import and application of the scandal; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff."

In the case of *Parvathi* v. *Mannar* (I. L. R., 8 Mad. p. 175), Turner, C. J., in delivering judgment observed: "It appears to us that disregarding the distinction between the method of publication adopted, the questions which demand serious consideration are whether or not actions may be maintained for injury to the reputation which may result only in mental pain, and whether damages may be awarded which are in their nature more or less punitive.

If in any case it is allowable to bring such actions, it appears to us they should be permitted where a mischievous or malicious person has without foundation set in circulation defamatory charges against his neighbour.

It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury.

The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction, and may, at any time, influence his neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim.

It was observed by Best, C. J., in *De Crespigny* v. *Wellesly* (1) that 'if we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter' and by Holt, C. J., in *Baker* v. *Pierce* (2), 'For my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace.'

And in *Button* v. *Heyward* (3) Fortescue, J., observed in reference to the *dictum* of Holt that it was also Hale and

(1) 5 Bing. 406.
(2) 6 Mod. 23.
(3) 8 Mod. 24.

Twisden, J. J.'s rule, and he thought it a very good one. Wider experience has persuaded English Judges that frivolous and vindictive litigation is countenanced by conceding too great a liberty for the institution of suits for defamation, and it has been the object of the English law so far as possible to set limits to such actions. Some of the restrictions are already recognized by Indian law. Words of mere vulgar abuse are not punished as defamation. But we are not prepared to accept the limitation of the English law which denies a civil remedy unless pecuniary damage is established or may be predicted as almost certainly probable.

We conceive that beyond the difficulty of estimating mental pain, there is no greater reason for refusing a man compensation for a wrong resulting in such pain than for refusing compensation for a wrong resulting in other physical suffering or in pecuniary loss, and that the true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured, and to inflict on him the pain consequent on such a belief.

Mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable, but when a person either maliciously or with such carelessness to inquire into truth as is sometimes described as legal malice, deliberately defames another, we conceive that he ought to be held responsible for damages for the mental suffering his wrong-doing occasions. Without accepting the very wide rule of the Scotch law that anything is actionable which produces uneasiness of mind (Starkie, p. 30), we consider the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming."

The reader will find the following in Mr. Michell's Jurisprudence with reference to the law of India, pp. 36-53:—

[The law of civil defamation has not been codified by the Indian Legislature, and the Courts in India have, in civil cases of libel or slander which have been brought before them, usually followed the English law. But in *Howard* v. *Mull*, 1 Bom. H. C. R., App., 91, COUCH, J. said: 'These (*i. e.* the 2nd and 9th Exceptions to s. 499, P. C., to which he had just

referred) are provisions of the criminal law; but the same rules ought to be applied to civil proceedings for defamation; and where a person would not be punishable under the criminal law, he ought not to be liable to pay damages to the person upon whose conduct or character he has expressed an opinion or made an imputation.' He continued, however, thus, 'But my view of the law is not founded merely upon the Penal Code, and I have referred to it rather by way of illustration than otherwise.'

By the English law oral abuse is not actionable unless special damage is proved, or unless the words used impute some indictable offence. But the High Court of Calcutta has held—upon what authority does not appear from the Reports of the Cases—that this rule of the English law ought not to be applied in India, at least in the mofussil, and that oral abuse, by which a man's feelings are injured and outraged, is actionable, though no offence be imputed, and no actual damage be caused. And these Calcutta decisions have been followed by the Bombay High Court, which relied on Bom. Reg. 4 of 1827 s. 26.

1 Suth. W. R., C. R., 19; 6 Id. 151; 8. Id. 256.

Kashiram Krishna *v.* Bhadu Bapuji, 7 Bom. H. C. R., A. C., 17.

An injunction to restrain the publication of a libel is a remedy which the Courts, English as well as Indian,* have no power to give. Compensation is the only civil remedy.

Prudential Life Assurance Co. *v.* Knott, L. R., 10 Ch. Ap. 679; Mulkern *v.* Ward, L. R. 13 Eq., 619; Shepherd *v.* Trustees of Port of Bombay, I. L. R., 1 Bom., 182.

The first essential constituent, of defamation is publication. Communication of the defamatory statement to a single person other than the person defamed constitutes publication in law. In *Reg. v. Burdett*, HOLROYD, J., speaking of libel, said, "Though in common parlance that word, ('publishing') may be confined in its meaning to making the contents known to the public, yet its meaning is not so restricted in law. The making of it known to an individual only is indisputably, in law, a publishing." So in the case of slander, speaking the words to or in the presence and hearing of only

4 B. & Ald. 95; and see Shepherd *v* Trustees of Port of Bombay I. L. R., 1 Bom. at p. 482.

* Mandatory injunction allowed under s. 55, Act I, 1877, *Vide* p. 45 *ante*, note (*e*).

2 Starkie, 245; 2 Esp. 624, 226; Cooke on Defamation 135.

one person other than the person slandered, is a publication; unless the language be one which is not understood by the third party or parties within whose hearing the words are spoken. Sending a libellous letter, enclosed in the usual way in an envelope, to the person libelled, is not, ordinarily, a publication of the libel; but it is so, if the sender knew that the addressee's clerk was in the habit of opening his letters, and the clerk opens the letter. Sending a defamatory statement by telegraph is a publication.

Wenmen *v.* Ash, 13 C, B., 836.

Delacroix *v.* Thevenot, 2 Stark., 63.

L. R. 9 C. P., 393.

In *Williamson* v. *Freer*, BRETT, J., said: "I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card. It was never meant by the Legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels."

Defamatory statements whether oral or written, are not actionable unless they are false. The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true), but because it shows that the plaintiff is not entitled to recover damages, for the law will not permit a man to recover damages in respect of an injury to character which he either does not or ought not to possess (*per* LITTLEDALE, J., in *M' Pherson* v. *Daniels*). An inaccuracy, however, not materially affecting a statement substantially true, does not render such statement actionable. In *Allexander* v. *North-Western Railway Co.*, the plaintiff charged, as a libel upon him, a notice published by the defendants, which stated that the plaintiff had been convicted by Justices of an offence against the defendants' bye-laws and condemned in the penalty of £9 1*s.* 10*d.*, including costs, or three weeks imprisonment. In reality he had been adjudged to pay a fine of £1 and £8 1*s.* 10*d.* costs, with an alternative of fourteen day's imprisonment. It was held that it was a question for the jury whether the statement charged as libellous was or was not

10 B. & C., 272,; and see Addision on Torts, 826.

34 L. J., Q. B., 152.

substantially true, and that the inaccuracy of the statement did not necessarily make it libellous.

The question of the truth or falsity of a defamatory statement is a different one in the criminal law. By the Indian law a defamatory statement is a crime notwithstanding it is true, unless it is made under any of the exceptional circumstances which render it privileged. That law (s. 490, P. C.) makes no distinction between true and false imputations, except by the provisions contained in the first and fourth Exceptions in the section. The former of these provides that "it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be published." This, of course, implies that the fact of an imputation being true is, unless its publication is for the public good, no defence to a criminal charge. The other Exception, the fourth, provides that "it is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings." In this case, whether or not the publication of the imputation, in itself, be for the public good, the reporter is saved from liability if his report be in substance a true representation of the Court's proceedings. In all other cases the truth of the imputation will be no defence to the criminal charge.

The English law formerly was, that the truth of the imputation was no defence, and could not be inquired into, in a criminal case of defamation in writing, though it was, and still is, an absolute defence in a criminal, as well as in a civil case, of oral defamation. But 6 & 7 Vic. c. 86 altered the law, s. 6 of that Statute giving the defendant in a criminal case of libel the right to have the truth of the libel inquired into and making the truth a good defence, provided the publication is for the public benefit. And ss. 4 & 5 make a distinction as to punishment between those who publish libels knowing them to be false, and those who do so with no knowlege whether they are true or false.

Cooke on Defamation, 61.

Folkard on Slander and Libel, 718, 4th ed.

Addision on Torts, 832.

The reason of this distinction is that in civil cases truth or falsity is of the essence of the case, but in criminal cases the essence of the offence consists in the tendency which the defamation has to produce a breach of the peace, and this

may be produced by it whether the statement is true or false. *See* Folkard, 718.

Malice, in the legal sense of the word, is essential to defamation. Malice (like *mala fides*) has a technical meaning in law different to, and wider than, its popular meaning. Malice in popular language is limited to the meaning of an intention to injure, in law it is applied also to the doing of a wrongful act voluntarily, though without intention to injure. "If," said BAYLEY, J., in *Bromage* v. *Prosser*, "I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because wrongful and intentional.* It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, there shall be a remedy against me for the injury it produces." That malice which consists of the voluntary wrongful action, irrespective of the intention, is usually called malice in law, and that malice which is the same as malice as understood in the popular sense is called actual malice or malice in fact.

4 B. & C., 255.

In every statement which contains defamatory matter, there is implied malice unless it is made on certain of those occasions or under certain of those circumstances which make the statement a privileged one, the presumption arising from the words themselves being rebutted by the occasion or circumstances.

Those occasions and circumstances which privilege statements in themselves defamatory, *i. e.*, save the authors of them from legal liability on account of them, must now be noticed. Except when I expressly refer to the Indian criminal law, the law I am considering is the English law. Wherever by the English law such a privilege exists, it is a privilege from civil and criminal liability alike.

Folkard, 722—6.

1. Reports, in newspapers or other publications, of the public proceedings of Courts of Justice, are privileged, provided they are substantially correct accounts of the cases reported, and provided the matter given in evidence and reported is not of a grossly scandalous, blasphe-

R. *v.* Creecy, 1 M. & S., 273; Stiles *v.* Nokes, 7 East, 492; Lewis *v.* Clement, 3 B & Ald., 710. R. *v.* Carlisle, 3 B & Ald., 169; Steele *v.* Brannan, L. R., 7 C. P., 261.

* 'Voluntary' would, I think, have been a more correct word to use here than 'intentional.' *See* Austin, 450.

Lewis *v.* Walter, 4 B. & A., 613; Flint *v.* Pike, 4 B. & C., 476.

mous or immoral character. The privilege does not cover reports of defamatory speeches or observations made by counsel or a party conducting his own case, even though the evidence be reported as well. And reports of preliminary inquiries before Magistrates have been held to be not within the privilege, if the accused be committed for trial.

Dunkan *v.* Thwaites, 3 B. & C., 556; Lewis *v.* Levy, 27 L. J., Q. B., 289; Addison on Torts, 792.

Comments on judicial proceedings and on the conduct of those who take part in them are privileged if they do not convey imputations which are not founded on and warranted by what actually transpired in Court.

Folkard, 200—1.

The reason of this privilege is that the advantage to the public in the advancement of public justice, to which reports and criticisms of cases within the limits of the privilege conduce, outweighs the damage done to individuals by the publication of the defamatory matter.

The Indian criminal law privileges substantially true reports of the proceedings of a Court of Justice, or of the result of such proceedings, and it extends the privilege to reports of public proceedings of Courts in preliminary inquiries. It also privileges the expression of opinions respecting the merits of a case, civil or criminal, which has been decided, or the conduct of a party, witness, or agent, as such, in any such case, or his character as shown in such conduct.

I. P. C., s. 499, *Fourth Exception and Explanation.*

I. P. C., s. 499, *Fifth Exception.*

2. Reports of debates in Parliament are privileged, if they are correct, full and impartial reports, and this rule would be applicable to reports of the debates or "Proceedings" of the Legislative Councils in India. The Ninth Exception to s. 499 of the Indian Penal Code would exempt authors of such reports from criminal liability, on the ground of their being "for the public good."

Addison, Torts, 793; Collett, Torts, 60; Wason *v.* Walter, L. R., 4 Q. B., 73.

3. Comments on the public conduct of public persons, and on the conduct of persons in matters of public interest, are privileged if made *bonâ fide*. The Indian Penal Code extends this privilege to comments on the character of

I. P. C. s. 499, *Exceptions second* and *third.*

such persons, so far as their character appears in such conduct. If this means that comments on the motives actuating such persons in such conduct are within the privilege, even when not founded on fact, provided they are made in good faith, the Indian criminal law extends this privilege, beyond what the English law allows. The English law on the subject is set forth in the judgments of the Queen's Bench in *Campbell* v. *Spottiswood*. In that case the defendant, the printer of "The Saturday Review," had published an article in that review containing imputations against plaintiff, that in proposing a scheme for converting the Chinese to Christianity he was actuated by the base and dishonest motive of obtaining money under false pretences. COCKBURN, C. J., there said: "Where the public conduct of a public man is made the subject of observation, and the writer who is commenting upon it makes imputations of motives which fairly and properly and legitimately arise out of the conduct itself, and the jury shall be of opinion, not only that the criticism was honest, but also well founded, there I should be prepared to say that the imputation so made would not be the subject of an action. But I do not think we should be laying down the law according to what has always been understood to be essential to the best interests of the community, if we were to say because a writer may fancy that the conduct of a public man is open to the suspicion of dishonesty, that therefore he is entitled to denounce that man as dishonest;" and (*Ibid*): "It is not enough that the jury are of opinion that there existed in the mind of the writer (of the imputations cast on the plaintiff) a *bonâ fide* belief in their truth. To hold that this affords any defence would be going to a dangerous extent and much further than the authorities warrant."

32L. J., Q., B., 185.

4. Another privilege resting on the same general ground as the one last mentioned, *viz.*, promotion of the public good, is that which is allowed to criticisms and reviews of published books and other literary productions, works of art and industry, and dramatic, musical and other performances at public entertainments. Anybody is entitled to criticise such productions or performances as severely and adversely to the authors or performers as he chooses, provided the criticism is not made the vehicle of

Folkard on Libel and Slander, Ch. xi, (4th Edition.)

personal maliguity towards the author or performer, but is directed only at the production or performance itself and the merits or demerits of the author or performer as exhibited therein. In *Strauss* v. *Francis*, COCKBURN, C. J., said: "It is of the last importance to literature, and through literature to good taste and good feeling, to morality and to religion, that works published for general perusal should be such as are calculated to improve and not to demoralize the public mind: and therefore it is of vast importance that criticism, so long as it is fair, reasonable and just, should be allowed the utmost latitude, and that the most unsparing censure of works which are fairly subject to it should not be held libellous. A man who publishes a book challenges criticism: he rejoices in it if it tends to his praise, and if it be likely to lead to an increase in the circulation of his work; and therefore he must submit to it if it be adverse, so long as it is not prompted by malice or characterized by such reckless disregard of fairness as indicates malice towards the author."

4 F. & F., 1,114.

And in *Soane* v. *Knight*, which was a suit brought for a libellous critique on some architectural works of the plaintiff, LORD TENDERDEN, in summing up to the jury, said: "The censure is certainly strong, nevertheless, if you think the criticism fair, reasonable and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff."

1 M. & M., 74.

The privilege given to such criticisms by the English law is also given by the Indian Penal Code, in these words: "It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further;" and the latter part of this provision is thus illustrated by *Illustration (d)* "A says of a book published by Z, 'Z's book is foolish, Z must be a weak man, Z's book is indecent, Z must be a man of impure mind." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses of Z res-

S. 499, *Sixth Exception.*

pects Z's character only so far as it appears in Z's book, and no further." In this case, as in the case of the privilege last before mentioned, the Indian criminal law appears to extend the protection beyond what the English law admits.

Folkard, 223—234.

The English cases appear not to support the application of this privilege, as the Penal Code does, to imputations on the *character of the author or performer*, even though made *bona fide* and confined to his character as shown in the production or performance, *unless the imputations can be proved to be true.*

5. Statements made to a person who is lawfully in a position of command or control over the person about whom the statement is made, are privileged if made without actual malice. The ground of the protection in this case is the duty, legal, moral or social, under which persons lie, of bringing to the notice of the proper authorities misconduct, abuses, or crimes. The privilege is provided for in the Eighth Exception to section 499 of the Indian Penal Code; and an accusation before a Magistrate and a complaint of the conduct of a servant made to his master or of the conduct of a child made to his father are given as examples.

Folkard, 270—273.

6. The Indian Penal Code in the Seventh Exception to s. 499 provides, "It is not defamation in a person having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates."

Illustrations.—A Judge censuring in good faith the conduct of a witness or of an officer of the Court, a head of a department censuring in good faith those who are under his orders, a parent censuring in good faith a child in the presence of other children, a schoolmaster whose authority is derived from a parent censuring in good faith a pupil in the presence of other pupils, a master censuring a servant in good faith for remissness in service, a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

The privilege given by this exception is recognized in the English law, civil as well as criminal, but the cases falling under it are ranged in English law under the privileges on the ground of private interest (as in the case of employer

censuring employee) or of duty, legal, social or moral (as in the case of a guardian censuring his ward or of a Government officer censuring his subordinate).

Folkard, Ch. xii, and pp. 515, 526—8, 724—5.

7. Imputations made by a person for the protection of his own private interest, or that of another, are privileged if made without actual malice and addressed only to the person or persons to whom, and in the manner in which, it properly concerns him to address them. Immunity from liability for such communications to that extent, is necessary for the due protection of property by its owners and the transaction of business. In *McDougall v. Claridge*, plaintiff, a solicitor, sued on a letter written by defendant to W. and Co. and charging plaintiff with improper conduct in the management of their concerns. It appeared, however, that the letter was intended as a confidential communication to them, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by the plaintiff. Lord ELLENBOROUGH said, that if the letter had been written by the defendant confidentially and under an impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide* with a view to the interests of himself and the persons whom he addressed, and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted.

1 Camp., 267.

The Ninth Exception to section 499 of the Indian Penal Code provides this privilege.

8. Communications made to persons having an interest in the matter thereof and containing imputations against a person are privileged if made in good faith. Thus statements about the character of a servant made by his former master to a person who being in want of a servant is interested in the information; a warning to a lady conveyed to her by her son-in-law as to the character of a man whom she was about to marry; a communication made by a creditor of an insolvent firm who had been winding

Todd *v.* Hawkins, 8 C. and P., 88

Spill *v.* Maule, L. R. 4 Ex. 232.

up its affairs to another creditor, imputing disgraceful and dishonest conduct to one of the partners of the firm in regard to the available assets of the firm.

This privilege is enacted in the Tenth Exception to section 499 of the Indian Penal Code.

9. Defamatory statements made in the course of judicial proceedings, by judges, assessors, jurors, parties, pleaders, and witnesses, are privileged; the ground of the protection being that unless persons occupying those positions were free from the constant apprehension of liability to make compensation or be punished for any defamatory statement they might make which was not founded on fact, the enforcement of the laws and administration of justice would be greatly impeded. Without that immunity from liability, parties, prosecutors, and witnesses would often be deterred from coming forward, and when they did come to Court, would often not speak with that freedom which is necessary in order that the whole truth may come out and justice be done; and pleaders in their arguments, and judges in their remarks, would be so tongue-tied as to be often prevented from efficiently discharging their respective functions.

As to the extent of the privilege of judges, the English cases do not agree. According to some of the decisions, statements made by them in judicial proceedings going on before them are absolutely privileged, *i. e.* they are protected though they are false and made maliciously and without reasonable or probable cause. According to other decisions, such statements are not protected if uttered with express (*i. e.* actual) malice and without reasonable or probable cause.

Scott *v.* Stansfield, L. R. 3 Ex., 220; Rex. *v.* Skinner, Lofft, 55.

Kendillon *v.* Maltby, 1 Car. and Mar. 402.

Allardice *v.* Robertson, 1 Dow, & Cl. 495.

Statements by parties in suits and other civil judicial proceedings, and by prosecutors and accused persons in criminal proceedings, made, in the course of such proceedings, in writings, as, *e. g.*, in plaints, affidavits, or written complaints, are privileged, even though such statements be made with a knowledge on their part that they are false, and out of malice, and though made of a person who is not a party to the proceedings, provided they are not irrelevant to the matters in issue.

Henderson *v.* Broomhead, 28 L. J. Ex., 360; Astley *v.* Young, 2 Burr., 807.

Statements made orally by parties while conducting their cases in Court are privileged, if relevant to the matter in issue, and not made out of malice; otherwise they are not protected.

Trotman *v.* Dunn, 4 Camp, 211; and see *per* Holroyd, J., in Hodgson *v.* Scarlett, 1 B. & Ald., 244—5.

Advocates have the same privilege as the parties themselves have in conducting their cases.

Hodgson *v.* Scarlett, 1 B. & Ald., 232.

Statements made by witnesses, whether by affidavit, or orally while under examination, in judicial proceedings, are privileged, though they be false and made with actual malice.

Revis *v.* Smith, 25 L. J. C. P., 195; Dawkins *v.* Lord Rockely, L. R., 7 H. L., 744; Kennedy *v.* Hilliard 10 Ir. C. L. Rep. (N. S.), 195; Seaman *v.* Netherclift, L. R. 1. C. P. D. 540.

In *Seaman* v. *Netherclift* the main question was, whether a statement made by the defendant in the witness-box was made in the course of the proceeding. He was an expert in handwriting, and when examined as a witness in a case of *Davies* v. *May* in which the genuineness of a will was in issue, he had stated his opinion to be that the signature purporting to be that of the testator was a forgery. The jury found the will to be genuine, and stated that they thought the imputations made upon the genuineness of the signature were groundless, and the presiding judge expressed his concurrence in their opinion, and added some strong observations on what he thought the recklessness and presumption of the defendant in persisting in declaring that in his opinion the signature was forged in the face of evidence of facts which the judge and the jury considered to be overwhelming evidence that it was genuine; which observations were reported in the principal journal ("The Times."). Shortly afterwards the defendant had been examined as a witness in another case with reference to certain alleged forgeries, and, under cross-examination, with the object of impeaching his credit he was asked, whether he had read the report of what the judge in *Davies* v. *May* had said as to his evidence in that case. He said he had. The cross-examining counsel then stopped and sat down. The defendant then said he wished to make a statement as to the case of *Davies* v. *May*. The judge said he could not hear any statement respecting a case which was not before the Court, and tried to stop him, but the defendant persisted and said, "I believe that will to be a rank forgery, and I shall believe so to the day of my death." It was for

these words that the defendant was sued (by one of the attesting witnesses to the will) for slander. In delivering the judgment of the Court, COLERIDGE, C. J., said, "I think it clear that the judicial proceeding was going on, and that the words declared (sued) upon were part of the defendant's evidence. The cross-examining counsel could not, by stopping, as he did, take away the right of the defendant to complete his answer, nor abridge his legal privilege of immunity for the words of the answer when so completed. The defendant had a right to add to the statement that he had read the remarks of Sir James Hannen (the judge in the first case) the further statement that in spite of those remarks he remained and always should remain of opinion that the will in question was a forgery. The question of counsel was ingeniously suggestive; and the defendant had a right, if he could, to meet the suggestion it conveyed."

The cases do not show clearly whether relevancy to the matters in issue is necessary to bring statements made by witnesses within the privilege. On this point the judgment in *Seaman* v. *Netherclift* contains the following remarks: "If relevancy in the words be material for the protection of a witness, I think the words were relevant; for the defendant's character had been in effect challenged by the counsel, and the defendant had a right to say what he thought would vindicate it. But whether relevancy be material or not, it seems to me that the main point is clear."

17 Suth. W. R. 283.

In *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdry*, the Judicial Committee said: "This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that, if it had been, strictly speaking, such an action, it could not have been maintained, for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them on oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to be one based on principles of public policy. The ground of it is this, that it concerns the public and the administration of justice, that witnesses, giving their evidence on oath in a Court of Justice, should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

The Indian Penal Code does not contain a clause particularly relating to and providing for the privilege of judges, parties, pleaders, and witnesses. To a certain extent those privileges fall within the general provision in the Ninth Exception to section 499, that "It is not defamation to make an imputation on the character of another, provided the imputation be made in good faith *for the public good;*" and complaints made by prosecutors before Criminal Courts fall within the Eighth Exception; and some of the remarks made by judges within the Seventh Exception. But the words "in good faith" in these Exceptions render these privileges much less extensive under the Indian Penal Code than they are under the English law. Defamatory Statements made in judicial proceedings by judges, witnesses, parties, and advocates, if made with actual malice or without due care and attention *(a)*, are not privileged under the Indian Penal Code.

(a) I. P. C., s. 52.

All statements made in the course of Parliamentary proceedings are privileged absolutely, *i. e.*, though false, scandalous, made with actual malice, and irrelevant to the matter under consideration. The reason of this protection is that the public interest requires that those to whom the Government of the country is committed, should be perfectly free and unhampered by private considerations when discharging functions of paramount importance to the nation. A member is liable to the censure of the House for using opprobrious or scandalous language in the House contrary to its rules, but this is the only tribunal to which he is subject for defamatory words there used. But if he publishes such statements outside the House, he loses his privilege entirely. The uttering them in Parliament, where they are privileged does not legalize them, so that they may be published anywhere else afterwards with impunity. Petitions presented to Parliament come within this privilege, being proceedings in Parliament.]

Folkard, Ch. X., Part I.

Dwarris on Statutes 83.

Lake *v.* King, 1 Saunders, 131; Folkard, 203.

(*e*) for slander;

Note.

SLANDER may be defined, as the imputation (1) of some offence for which the party might be indicted and punished;

(2) of an existing contagious disorder tending to exclude the party from society; (3 an unfitness or inability to perform an office or employment of profit, or want of integrity in an office of honor; (4) words prejudicing a person in his lucrative profession or trade; (5) any untrue words, occasioning actual damage.

The difference between 'slander' and 'libel' consists in the former being oral and the latter being written. No action for damages for slander or libel is maintainable if the matter alleged is true. But a party may be liable to punishment under the Penal Code, even if the matter be true. Some slanderous words are actionable, while others are not unless special damage ensues. "Thus, falsely to impute to any person that he has been guilty of any criminal offence (not necessarily indictable, if punishable corporally and not by fine only) or that he is (but not that he once was) afflicted with any loathsome or contagious disease, as leprosy, &c., which would cause him to be shunned; or to speak falsely of a tradesman in the way of his trade, as that he uses false weights, or to make any other imputation the natural consequence of which is to prevent people resorting to his shop; or to impute misconduct, or gross ignorance, or incapacity to professional men in the discharge of their professional duty; as, to say of a medical man that he has misconducted himself with his female patients, or that he is a quack or not legally qualified; or to say of a barrister or vakeel that he has cheated or deceived his clients; or of a clergyman that he leads an immoral life; or of a public officer that he is habitually negligent or corrupt, but not merely that he wants capacity,—such imputations, if the party is still in the exercise and practice of his trade, profession, or office at the time, are actionable without proof of damage."—*Collett.*

An action by a female for words imputing a want of chastity was held maintainable, on proof of loss of marriage. (1) An action was held maintainable, for slanderous words, by reason of which the plaintiff was turned out of her lodging and employments. (2) No action lies for slanderous words, immediately retracted or explained, in the same conversation, and in the hearing of all who heard them spoken. (3) Words of heat and passion, as to

(1) 1. Hilliard p. 273.
(2) Do. 272.
(3) Do. 258.

call a man rogue and a rascal, if productive of no ill consequence, are not actionable. (4) If the words are not actionable in themselves, limitation runs from the date when the special damage complained of results. "It is apprehended that the plaintff cannot bring a subsequent action for subsequent damage. (See Lamb *v.* Walker 3 Q. B. D., 389, 395). This is not a case of a continuing wrong under s. 23. It comes under s. 24"—*Tagore's Law Lectures*, 1882.

"An action for 'slander of title' as defined by Tindal C. J., 'is not properly an action for words spoken or for a libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title:' *Malachy* v. *Soper*. The plaintiff, therefore, to sustain such an action must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. (Addison on Torts, 4th Edition, p. 809)". (1) "To *slander another man's title*, by spreading such injurious reports, as, if true, would deprive him of his estate (as to call the issue in tail, or one who has land by descent, a bastard), is actionable provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. III Blackstone p. 132.

(*f*) for adultery or seduction;

The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together, and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury; and the Court will not interfere with their estimate of damages, unless it is manifestly and palpably outrageous. Where the plaintiff's wife had not been criminally connected with the defendant alone, Lord Ellenborough directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, &c., as they might suppose

(4) III. Blackstone, p. 130.

(1) Alexander's Case-Law on Torts.

to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained. So, proof of adulterous intercourse between the wife and other men prior to the commission of the adultery with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing.—*Addison on Torts, fifth ed., pp.* 541-542.

"To entitle a person to maintain an action for the seduction of a girl, it must be proved that the relationship of master and servant existed between the plaintiff and the person seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant only. Thus, in the case of an orphan living with a relative or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relative or benefactor is the proper person to sue for the wrong done; and standing *loco-parentis*, and being thus entitled to sue, he is permitted to recover damages beyond the mere loss of service, as when the action is brought by the actual parent.

The law gives no remedy to a parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity; but, if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

The foundation, therefore, of the action by a father to recover damages against a wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service the father is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be proved, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by

her labour, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, &c; or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered her unable to learn the trade. However slight the act of service may be, it must be a real, genuine service, such as the parent may command. Milking the cows, nursing the children, making tea, or doing any household work at the command of the parent is, however, quite sufficient to constitute the relationship of master and servant, when the girl is residing with her father and mother.

As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction; for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as being in the subordinate position of a servant, and the father cannot maintain an action for loss of service. If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person, the father has no ground of action for the seduction, even though he received part of her wages (unless the person with whom she is living inveigled her away from home into a pretended service, for the purpose of seducing her), and although it is proved that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired. But, if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages; and, if she is seduced while on her way home from her master's to her father's house, having been dismissed by her master, that is sufficient constructive service. Where a girl was bound to serve the defendant for eleven

hours during the day as a servant in husbandry, but slept at her father's, and after her day's work performed services for him, it was held that there was a sufficient service to the father. Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home and assist her widowed mother in needle work, has been held to be insufficient to enable the mother to maintain an action for damages, although the seduction actually is effected while she is on such a temporary visit, and during such visit she assists in the housework. If the relation of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action."—*Addison on Torts, fifth ed, pp.* 533-535.

(*g*) for breach of contract of betrothal or promise of marriage;

Note.

As specific performance of a contract of betrothal cannot be enforced (*vide* s. 21, Specific Relief Act I of 1877), the party injured by the breach is entitled to recover compensation for any pecuniary damages that might have been sustained, and also for any injury to character or prospects in life which may naturally arise in the usual course of things from such breach (*vide* s. 73, Indian Contract Act IX of 1872; Addison on Contracts 5th ed., p. 743; Shaikh Bhugun *v.* Shaikh Rumjan, 24 W. R., 380; Umed *v.* Nagindas, 7 Bom. H. C. O. C. 122; Nowbut *v.* Mt. Lad. Kooer, 5 N. W. P. 102; *re* Gunput Narain Singh, 1 Cal. 74.) According to Mr. Mayne, all expenses resulting from the abortive contract would be recoverable in an action for damages (*vide* Mitakshara, II. 11, § 28). Of course, no such claim could be maintained where the contract failed from the wilful, or negligent, conduct of the complaining party. (Divi Virasalingam *v.* Alaturti, Mad. Dec. of 1860, 274).

(*h*) for inducing a person to break a contract made with the plaintiff;

Note.

If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuation of the defendant, damages far beyond

the value of the subject-matter of the contract may be recoverable from the wrong-doer. The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away; but the jury are justified in giving ample compensation for all the damage resulting from the wrongful act. If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it.—*Addison on Torts, p.* 533.

(*i*) for obstruction of an easement or diversion of a watercourse;

Note.

A continuing obstruction gives rise to a fresh cause of action for a claim of damages, as fresh damage results from it.—*See* 3 Mad, 111; 113.

(*j*) for illegal, improper or excessive distress or attachment;

(*k*) for improper arrest under Chapter XXXIV of the Code of Civil Procedure, or in respect of the issue of an injunction wrongfully obtained under Chapter XXXV of that Code; or

Note.

Vide notes under sub-clause (b), p. 59

"The foundation of an action for malicious arrest is, that the party has obtained an order or authority from a Judge to make an arrest, by imposing some false statement upon the Judge, knowingly and designedly, and for the purpose of obtaining some undue advantage, or by stating certain facts as being true within his knowledge, when he knew nothing about them, or his belief in the truth of a particular statement, when he had no reasonable or probable cause for his belief. If a person sets the process of the Court in motion and a wrong person is arrested, he is only responsible if he obtained such process fraudulently and improperly. If a party truly states facts, and the Judge thereupon does an act which is erroneous, the party is not liable; for the damage then arises from the mistake of the Judge, and not the false statement of the party. So, if a party, without fraud or falsehood, or without the want

of reasonable and probable cause, fairly states facts, and succeeds in satisfying a Judge that the defendant is about to quit the country, and so obtains an order to arrest him, he is not liable to an action, though the defendant had no such intention. The subsequent discharge of the party, on showing that he had no such intention as imputed, affords no ground of action against the party procuring the arrest, if the original order for arrest was fairly obtained."—*Collett.*

(*l*) for injury to the person in any case not specified in the foregonig sub-clauses of this clause;

(36) a suit by a Muhammadan for exigible (*mu'ajjal*) or deferred (*mu'wajjal*) dower;

Note.

[The amount of dower is fixed entirely by a consideration of the circumstances of the husband and wife. In India, for example, among that portion of the Mussulman community which occupies an analogous position to the upper middle class of English society, the amount of dower ranges from 4,000 rupees to 40,000 rupees (£400 to £4,000). In Behar, the latter is, generally speaking, the customary dower; in Lower Bengal, the former. Among the lower classes the *mahr* varies from 25 rupees (£2 10s.) to 400 rupees (£40). In princely families the dower consists of several lacs of rupees. When no dower is fixed at the time of marriage, or has not been distinctly specified either before or after marriage, or has been intentionally or unintentionally left indeterminate, the woman becomes entitled to what is called the *mahr-i-misl* "the dower of her equals," or the customary dower. The customary dower of a woman is regulated with reference to the social position of her father's family and her own personal qualifications, and also, as the author of the "Hedaya" points out, to the dowers that have been given to her female paternal relations, such as her consanguine sisters or paternal aunts, or the daughters of her paternal uncles. In fixing the amount, other points besides the custom which prevailed in the woman's paternal family must also be taken into consideration. For example, if one sister marry a rich, and the other, a comparative poor man, the dower of the one cannot be taken as a standard for the dower of the other.

It is therefore laid down that, in order to find a proper test for the customary dower of a woman, "the *condition* of her husband in respect of wealth and lineage should be *like* that of the husband of the woman to whom *she* is compared." In the same way, a woman may be superior to all the female members of her father's family in intellectual attainments or personal attractions, and accordingly her dower can hardly be regulated by the *mahr* of her less fortunately endowed female relations.

The customary dower or *mahr-i-misl* varies, therefore, in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of dower in any particular case; when therefore, it is said that the dower of a woman, where no *mahr* is stipulated or specified at the time of marriage, should be the "dower of her equals," it is only intended to imply, that an approximation may be made by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attractions from the female relations with whom she is compared.

The same rule respecting customary dower is in force among the Shiahs. "The *mahr-i-misl* of a woman," says "Irshâd," "is regulated by a regard to the nobility of her birth, the beauty of her person, and the custom of her female relations." To this the "Tahrîr-ul-Ahkâm" and the "Jâma-ush-Shattât" add, that "as there exist different customs in different places in respect of dower, in fixing the amount of the *mahr-i-misl*, regard must be paid to the local customs, with special reference to the dowers of the women, who are the equals of the female in question, in knowledge, lineage, wealth, understanding, &c.

Among the Shiahs, dowers are of three kinds, viz, (1) the *mahr-i-sunnat* or traditional dower; it refers to the amount of dower adopted by Mohammed, and is said to be 500 *dirhems*; (2) the *mahr-i-misl*; and (3) the *mahr-i-mussamma*, the specified dower.

Some of the Shiah writers are of opinion that where no dower is settled at the time of marriage, and an approximation is made from the custom prevailing in the woman's family, the amount should not exceed the traditional 500 *dirhems*.

As a rule, however, dowers are always settled before marriage, and in India, especially, no condition relating to it is left for future administration.

Mâlik has recommended to his followers the payment of the entire dower prior to the consummation of marriage, and the rule prescribed by him is practically followed in all those countries where his doctrines are in force.

As there is nothing in the Koran or in the "Ahâdîs," tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults, says M. Sautayra, have held that a portion of the *mahr* should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties.* The portion which is payable immediately is called the *mahr-i-muajjal*, "prompt" or "exigible;" and a wife can refuse to enter the conjugal domicil until the payment of the prompt portion of the dower. The other portion is called *mahr-i-muwajjal*, "deferred dower," which does not become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred; but the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either the husband or the wife. Generally speaking, among the Mussulmans of India, the *mahr-i-muwajjal* is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfil the terms of the marriage contract in their entirety.]—Syed Ameer Ali's Personal Law of the Mahomedans, pp. 304-308.

Where it is not expressed whether the payment of the dower is to be prompt or deferred, the rule is to regard the whole as due on demand.—(P. C.) 2 P. C. R 823 (19 W. R. 315.)

Where the dower is prompt,the wife is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him until he has paid her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband

* See the case of Mehr Ally *v.* Amani, 2 B. L. R., A. C., p. 306.

may have already cohabited with consent since their marriage. I. L.R, 1. All. 483. *See* also I L. R, 2 All, 831.

(37) a suit for the restitution of conjugal rights, for the recovery of a wife, for the custody of a minor, or for a divorce;

Note.

[Where the wife is an infant, and the husband seeks to have her in his custody, the proper course is to proceed according to the provisions of Act IX of 1861. The husband may also by a civil suit obtain an injunction upon any person detaining his wife, to abstain from putting any obstruction in the way of the wife's returning to her husband; but no order can be made upon such person directing him to send the wife to her husband.*

Where the wife is qualified by her age to perform her conjugal duties, the proper remedy for the husband is a suit for restitution of conjugal rights. It was at one time doubted whether such a suit would lie in the Civil Courts of India and the ground for such doubt was the difficulty of enforcing the performance of conjugal duties in their detail; but the point has been settled by the decision of the Privy Council in the case of Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum.† In that case the Judicial Committee observed: "Upon authority then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife and for a sentence that she return to cohabitation, and that that suit must be determined according to the principles of the Mahomedan Law. The latter proposition follows not merely from the imperative words of Regulation IV of 1793, section 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities, so, especially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties." Though the case was one between

* 8 W. R, P. C., 3; 11 Moores I. A., 551

† Lall Nath Misser *v.* Sheoburn Pandey, 20 W. R., 92. But see Hurka Shankur *v.* Ranjee Munohur, 1 Borr., 353; 1 Morleg's Digest, 288, pl. 11.

Mahomedans, the rule laid down evidently applies *mutatis mutandis* to the Hindus, and it has been so applied (Kateeram Dokanee *v.* Mussamut Gendhenee, 23 W. R., 178).

Though, as a rule, either spouse is entitled to a decree for restitution of conjugal rights against the other, there are cases in which such decree will not be granted. Thus, where a custom binding upon a particular class or caste is established, by which the husband is not to cohabit with his wife until a second ceremony is gone through after marriage, a claim for restitution of conjugal rights will not be enforced where such ceremony has been neglected (Bool Chand Kalta *v.* Mussamut Janokee, 24 W. R, 228; 25 W. R., 386.)

How far cruelty and ill-treatment would be an answer to a suit for restitution of conjugal rights is an important practical question. Judging from the precept of Manu that even the worst husband is to be revered as a god (V, 154), it might seem that cruelty and ill-treatment would not excuse a wife's non-performance of conjugal duties. But the Hindu Law is not really so cruel. It excuses a wife who is averse from a husband who is a lunatic, or a deadly sinner, or an eunuch, or a person afflicted with any loathsome disease (Manu, IX, 79). Following this spirit of the Hindu Law, the High Court of Bombay in one case (Bai Premkuvar *v.* Bhika Kallianji, 5 Bom. A. C. J, 209) refused to decree restitution of conjugal rights in favor of a husband who was suffering from leprosy and syphilis.

It is not every unkind act that would disentitle a husband to enforce his marital rights. The mere taking of a wife's jewels, or the marrying of a second wife, has been held to be no bar to a Hindu husband's claim for restitution of conjugal rights (Jeebo Dhon Banyah *v.* Mussamut Sundhoo, 17 W. R, 522; see also Verasvami Chetti *v.* Appasvami Chetti, 1 Mad., 357; Sitanath Mookerjea *v.* Sreemutty Haimabutty Dabee, 24 W. R., 377.) In *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, their Lordships of the Privy Council observed: "It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved,

afford good grounds for refusing to him the assistance of the Court. And as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband." (11 Moore's I. A., 615; 8 W R. P. C, 15)

The question, what constitutes legal cruelty sufficient to bar a claim for restitution of conjugal rights, has been very fully discussed by Mr. Justice Melvill in Yamuna Bai *v.* Narayan Moreshvar Pendse (I. L. R, 1 Bom., 164), and the conclusion arrived at is, that the Hindu law on the question of what is legal cruelty between man and wife would not differ materially from the English law; that to constitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it; and that mere pain to the mental feelings, such for instance as would result from an unfounded charge of infidelity however wantonly caused, or keenly felt, would not come within the definition of legal cruelty.

Where a husband had ill-treated a wife on account of a favorite mistress, and had agreed to separate from the wife, and had refused her maintenance during the period of separation, it was held that he was not entitled to insist upon restitution of conjugal rights. (Moola *v.* Nundy and Mussamut Poonia, 4 N. W. P, 109).

Conjugal infidelity in a wife would bar her claim for restitution of conjugal rights. The Hindu law allows a disloyal wife to be forsaken. (Colebrooke's Digest, Bk., IV, 79, 80).

A party who has renounced Hinduism is not entitled to enforce a claim for restitution of conjugal rights against a husband or a wife who remains a Hindu. The Hindu law allows one to forsake a degraded husband, or a degraded wife (Colebrooke's Digest, Bk IV, 58, 62, 151), and degradation from caste is a natural consequence of apostacy. Act XXI of 1850 by enacting that loss of caste or change of religion shall not inflict on any person forfeiture of *rights* or property, seems to throw some doubt on the point. But the remarks of Mr. Justice Campbell in *Muchoo v. Arzoon Sahoo* (5 W. R, 235) go a great way in support of the rule stated above. After holding that the right to the custody of children is a right within the meaning of Act XXI of 1850, the learned Judge observed:

"The pleader for the appellant further argued that no one can be permitted so to use his right as to deprive any other person or persons of *their* rights. For instance, he says, a husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindoo. This is so far true; and in this case, the claim to the wife was rightly dismissed, but was, I think, dismissed simply for the reason that, admitting the husband's *prima facie* claim to the custody of the wife, that claim may be defeated by a reasonable plea. If a wife pleads that her husband beats and ill-uses her in such a way that she cannot reasonably be required to live with him, and that plea is made out, doubtless the Court will not enforce a restitution of conjugal rights. So also, if she pleads that the husband, by change of religion, has placed himself in that position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings in which she has been brought up, and in the enjoyment of which she married, that plea would also be a good plea."

So Sir Adam Bittleston on one occasion said.*

"So far, however, as Hindoo law is concerned, it seems to me enough to say that, in my opinion, a Hindoo married woman who deserts her husband, becomes a convert to Mahomedanism, and adopts the habits and lives as the wife of a Mussulman, is altogether out of the pale of Hindu law; that she ceases to have any recognized legal *status* according to that law, which counts her as one dead, or at least recognizes her existence only as an object of charity. This is not inconsistent with such passages as that cited from Manu: 'That neither by sale nor desertion can a wife be released from her husband;' which certainly have reference to persons still within the pale of Hindoo law. It seems to me, however, at variance with the spirit of Hindu law, to hold that it concerns itself with a woman in such case, as far as to impose on her any obligation not to marry again, *provided the second husband be not a Hindu;* and if she does marry again, the validity of that marriage must, I think, depend upon the law of the sect to which she has become a convert."

* Rahmed Beebee *v.* Rokeya Beebee, 1 Norton's Leading Cases on Hindu Law, 12.

But I must tell you that the decisions of our Courts have not been uniform on this point. Thus in one case (*in re* the wife of P. Streenevassa, 1 Norton's Leading Cases on Hindu Law, 13), Sir W. Burton is reported to have ordered the wife of a converted Brahman to be restored to him upon *habeas corpus*; and in another case (Mussmut Emurtee *v.* Nirmul, N. W. P. Rep., 1864, p. 583), the Agra Sudder Court held that loss of caste by a husband could not dissolve his marriage, or bar his claim to the possession of the wife's person.

Considering, however, the feelings of those who really profess the Hindu faith, it would be a matter of extreme hardship, to say the least, to enforce restitution of conjugal rights in such cases; and I should therefore venture to affirm that the view taken by Mr Justice Campbell is the proper view of the matter.

The case in which a Hindu husband or wife becomes a convert to Christianity, is provided for by Act XXI of 1866. Under that Act, a convert can sue a native husband or wife for conjugal society, and in case of refusal by such husband or wife to cohabit with the convert, on the ground of change of religion, the marriage between the parties shall be declared dissolved.

For suits for the restitution of conjugal rights, the period of limitation is two years, from the time when such restitution is demanded and refused, the party refusing being of full age and sound mind.]—Tagore Law Lectures, 1878, pp. 121-131.

Where cruelty on the part of the husband has been condoned by the wife, a much smaller measure of offence would be sufficient to neutralize the condonation, than would have justified the wife, in the first instance, in separating from her husband. But the act or acts constituting the offence must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct, and consequently to entertain well-founded apprehension for her personal safety. Jogendranundini Dassee *v.* Hurry Dass Ghose, I. L. R, 5 Cal. 500.

(38) a suit relating to maintenance ;

Note.

"The importance and extent of the right of maintenance necessarily arises from the theory of an undivided family. Originally, no doubt, no individual member of the family had a right to anything but maintenance. This is still the law of Malabar, and the case is much the same in an ordinary Hindu family under Mitakshara law prior to partition. The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies, and to defray the expenses of their marriages. In other words, those who would be entitled to share in the bulk of the property, are entitled to have all their necessary expenses paid out of its income. But the right of maintenance goes farther than this. Those who would be sharers, but for some personal disqualification, are also similarly entitled for themselves and their sons, for their wives, if chaste, and for their daughters. As for instance, those who from some mental or bodily defect are unable to inherit; illegitimate sons, when not entitled as heirs, even though the connection from which they sprung may have been adulterous;* persons taken in adoption, whose adoption has proved invalid, or who have been deprived of their full rights by the subsequent birth of a legitimate son. Whether the same privilege extended to outcasts and their offspring, is a point upon which the authorities differ. Since Act XXI of 1850 (Freedom of Religion) it has ceased to be a point of any practical importance. Concubines also are entitled to be maintained, even though the connection with them is an adulterous one.† But this liability only exists where the connection was of a permanent nature, analogous to that of the female slaves who in former times were recognized members of a man's family.‡ *Afortiori* the widows of the members of the

* Mitakshara, i. 12, § 3; Muttusamy *v.* Venkata Subha, 2 Mad. H. C. 293; affirmed 12 M. I. A. 203; 2 B. L. R. (P. C.) 15; 11 W. R. (P. C.) 8; Chuoturya *v.* Sahub Purhulad, 7 M. I. A. 18; 4 W. R. (P. C.) 132; Rahi *v.* Govind, 1 Bom. 97; Viraramuthi *v.* Singaravelu, 1 Mad. 396.

† Mitakshara, ii. 1, § 28; Daya Bhaga, XI. 1, § 48; V. May, IV. 8, § 5; 1 Stra. H. L. 174; 2 W. Mac N. 119; W. & B. 149; Khemkor *v.* Umiashankar, 10 Bom. H. C. 381; Vrandavandas *v.* Yamuna, 12 Bom. H. C. 229.

‡ Sikki *v.* Vencatasamy, 8 Mad. H. C. 144.

family are so entitled, provided they are chaste, and so long as they lead a virtuous life;* and the parents, including the step-mother, and mother-in-law †. The sister, or step-sister, is entitled to maintenance until her marriage, and to have her marriage expenses defrayed. After marriage, her maintenance is a charge upon her husband's family; but, if they are unable to support her, she must be provided for by the family of her father."—Mayne, pp. 416-417.

During the father's lifetime, children, whether legitimate or illegitimate, are entitled to maintenance from him, only so long as they are young and unable to provide for themselves. The minority of the father would be no ground for excusing him from the necessity of providing support for his child, whether legitimate or illegimate; but before any order for maintenance can be made, the law requires it to be proved that the father has sufficient means. (The Queen on the information of Mussamat Narain Koer *v.* Roshun Lall, 4 N. W. P, 123). The High Court of Bengal has held that, under the Hindu Law, a father is not bound to maintain a grown-up son, even if he is laboring under a temporary disorder (Prem Chand Pepara *v.* Hoolas Chand Pepara, 12 W. R, 494). In the Hindu law, the son is as much bound to maintain his aged parents, as the father is, to support his infant children (Colebrooke's Digest, Book V, 77; Macnaghten's Precedents of Hindu Law, 113-115)—*See Tagore Law Lectures*, 1878, pp. 169-175.

Under the Hindu law there is no legal obligation upon a step-son to support a step-mother independently of the

* "Let them allow a maintenence to his women for life, provided these preserve unsullied the bed of their lords. But if they behave otherwise, the brethren may resume that allowance" (Narada, XIII. §26). This text is said by Jimuta Vahana to apply to women actually espoused who have not the rank of wives, but another passage of Narada (cited Smriti Chandrika, XI.1, §34) is open to no such objection. "Whichever wife (*patni*) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment." See too, Smriti Chandrika, XI. 1 §47; 2 W. Mac N 112; Muttammal *v.* Kamakshy, 2 Mad. H. C. 337; *per curiam*, Sinthayee *v.* Thanakapudayen, 4 Mad. H. C. 185; Kerry Kolitany *v.* Moneeram, 13 B. L. R. 72, 88; 19 W. R. 367. But See Honamma *v.* Timannabhat, 1 Bom. 559, where it was held that subsequent unchastity did not deprive a widow of a mere starving maintenance awarded by decree.

† 2 W. Mac N. 113, 118; W. & B. 88, 92; per Norman, J., Khetramani *v.* Kashinath, 2 B. L. R. (A. C. J.) 15; 10 W. R. (F. B.) 93; Coopummal *v.* Rookmany, Mad. Dec. of 1855, 238. *Per curiam*, Savitribai *v.* Luxmibai, 2 Bom. 597.

existence in his hands of family property—Bai Daya *v.* Natha Govindlal, I. L. R, 9 Bom. 279.

Where the Civil Court, upon the suit of a Hindu widow for maintenance, makes a decree containing an order in express terms to the defendant to pay to the plaintiff the amount claimed by her for maintenance during a past period, but as to the future merely declares her right to receive maintenance at an annual rate from the defendant, the proper way of enforcing the right thus declared is not by executing the decree, but by bringing a fresh suit. Decrees declaring a right to maintenance and directing payment of arrears should contain an order directing payment of future maintenance. A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce her right.—Vishnu Shanbhog *v.* Manjamma, I. L. R, 9 Bom. 108.

S, a Hindu, obtained a decree for maintenance at a certain rate against R, her father-in-law. After the death of R, V, who was adopted by R, subsequent to the decree, sued S to have the rate reduced on the ground that the estate of R, which came to his hands, was considerably diminished in value:—*Held*, that, as the estate had been diminished by the voluntary acts of R and V, the claim could not be allowed.—Vijaya *v.* Sripathi, I. L, R, 8 Mad. 94.

The doctrine that in certain relationships, and independently of the possession of ancestral estate, maintenance is a legal and imperative duty, while in other relationships it is only a moral and optional duty, discussed. (O. J. F. B,) I. L. R, 2 Bom. 573.

Though the maintenance of a wife and children may in certain cases be a charge on the husband's property as against a purchaser, it is not so in a case in which the sale took place in payment of a family debt, which it was the primary duty of the head of the family to pay. I. L. R, 2 Mad. 126.

A Sudra having kept the wife of another man in his house for many years as a concubine, had a son by her, whom he recognized as his own. In a suit brought by the son, who was of age, to recover maintenance from his

putative father:—*held,* that he was entitled to recover.—Kuppa *v.* Singaravelu, I. L. R, 8 Mad. 325

By the Hindu law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desireable (I. L. R, 3 Bom; 420 P. C). Under the Limitation Act, a Hindu's suit for arrears of maintenance must be brought within twelve years from the time when *the arrears are payable.* Unless maintenance has been actually withheld under circumstances amounting to refusal, no action lies for arrears. (I. L. R, 3 Bom. 421 P. C). If a suit for the declaration of a *right* to maintenance is barred by Art, 129 of the Limitation Act, by reason of the defendant having *denied* the right more than twelve years before the institution of the suit, a suit for subsequent arrears may be barred on the principle of the decision in the case of Chhaganlall *v.* Bapubhai, I. L. R, 5 Bom. 68. But as the right to maintenance is *not extinguished* by s. 28, this question is not free from doubt. (See the remarks of the Privy Council in Maharana Futtehsanji *v.* Desai Kullianraoji, 21 W. R, 178, 182, P. C.). A denial made in *answer* to a demand is a *refusal.* Even if maintenance has not been demanded by the plaintiff, his right may be *denied* by the defendant, and limitation under Art 131 will run from the date of the denial. (See I. L. R, 7 Mad, 343).

(39) a suit for arrears of land-revenue, village-expenses or other sums payable to the respresentative of a village-community or to his heir or other successor in title;

(40) a suit for profits payable by the representative of a village-community or by his heir or other successor in title after payment of land-revenue, village-expenses and other sums;

(41) a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or by a manager of

joint property, or a member of an undivided family, in respect of a payment made by him on account of the property or family ;

(42) a suit by one of several joint mortgagors of immoveable property for contribution in respect of money paid by him for the redemption of the mortgaged property ;

(43) a suit against the Government to recover money paid under protest in satisfaction of a claim made by a revenue-authority on account of an arrear of land-revenue or of a demand recoverable as an arrear of land-revenue ;

(44) a suit, the cognizance whereof by a Court of Small Causes is barred by any enactment for the time being in force.

Note.

This clause will exclude the following among other suits :

(*a*) Suits for compensation for infringing copyright (I. L. R. 6 Cal. 499) ;

(*b*) Suits for compensation for infringing the exclusive privilege of an inventor (Act XV, 1859, section 22) ;

(*c*) ; Suits against Sovereign Princes or Ruling Chiefs, or Ambassadors or Envoys of Sovereign States (Act XIV, 1882, section 433) ;

(*d*) Suits for dissolution of marriage or judicial separation (Act IV, 1869) ; and

(*e*) Suits founded on the liability of a contributory (Act VI, 1882, section 125).

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APPENDIX.

Right of Support.—Excavation.

(Hilliard's Law of Torts, Vol. II pp. 9 to 11.)

The prevailing doctrine now is, that a person building a house contiguous to, and adjoining the house of another, may lawfully sink the foundation of his house below that of his neighbour's, and is not liable for any consequential damage, provided he used due care and diligence to prevent injury. It is said, "One land-owner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, in the Roman law, was called a servitude."

But a distinction is made, between an injury to a *house* built upon the land, and an injury to the *soil* itself. It is held, that, although the owner of land adjacent to land of another has no right to remove the earth, and thus withdraw the natural support of his neighbour's soil; and, if he does, is liable for damages, and will be restrained by injunction: yet this doctrine is strictly confined to those cases, in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. Thus, where one built a house on his own land within two feet of the boundary line, and, ten years afterwards, the owner of the land adjoining dug so deep into his own land as to endanger the house; and the owner of the house, on that account, left it and took it down; held, no action lay for the damage done to the house, but only for the damages arising from the falling of the natural soil into the pit so dug. So, where a declaration stated, that A was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B, and that B dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house, that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the digging so near, &c., the defendant had judgment. But, if it had appeared that the plaintiff's house was *ancient*, or if the complaint had been, that the digging occasioned a falling in of the soil of the plaintiff, to which no artificial weight had been added; it was doubted whether an action would not have lain. So A owned a building, the footing of one of the walls of which supported one of the walls of an adjoining house, belonging to B. A, being about to pull down and remove the foundations of his house, notified B of his intention, and used reasonable and ordinary care in the work, but took no measures to preserve B's building, although the nature of the soil required him to lay the new foundation several feet deeper than the old. Held, A was not liable for an injury hereby caused to B's house. So the owner of a lot, within six feet of Christ's Church, in New York, built more

than thirty-eight years before, commenced the erection of a building thereupon, to be six stories high; and was sinking the foundation sixteen feet deep, and ten feet lower than that of the church. The wall of the church, at the corner opposite to which the excavation had been completed, had so settled as to leave a considerable crack. The proprietors of the church filed a bill for injunction, stating these facts, and that the church was in great danger if the work proceeded; but not that the defendant was improving his property in an unreasonable or unusual manner, or with any intention to injure the church, or that the plaintiff had any claim by prescription or grant from the defendant. Upon an application to dissolve the injunction which had been granted, held, although one has a right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, this right does not extend to artificial erections; and the injunction was accordingly dissolved.

RIGHT OF SUPPORT.

(Smith's Law of Negligence pp. 24—27.)

THE rights which a man has over his own land are, like other rights, subject to modification by the conflicting rights of others. The allegation of negligence presupposes, as we have seen, the existence of equal rights. Where a man is exercising a right upon his own land, and, in doing so, disturbs the right of another, the former right may be dominant or subordinate, in either of which cases no question of negligence arises. If A digs a hole in his land, and B, who has a right to personal security (but no right to be on the land), falls into it, A's right is paramount to B's, and no question of negligence arises; but if A had permitted B to come upon his land, the rights would be equal, and questions of negligence would arise, *viz*, whether the pit was negligently left unguarded, and whether B was using his right of being here with care. If A is woner of the surface of the land, and B has rights of mining beneath, or beneath adjoining land, A's right of support for his land is paramount, and it is no answer that B has used the utmost care. So if A digs a hole near the edge of his land, and causes B's ancient house to fall, no question of negligence arises, but a wrong has been committed, whatever care may have been taken.* These questions of right of support do not come within the bounds of this treatise. But in the case of a house recently built upon adjoining land, it may be that the rights are equal, and that the adjoining owner is answerable for negligence only in the exercise of his right to use his own land. This is a question, however, which is involved in much doubt. Upon the one hand many expressions of the judges will be found which support the proposition above stated, while the case of Gayford *v.* Nicholls (9 Exch, 702) is, I think, a clear authority to the contrary. The text writers appear generally to doubt what the law is. After saying that the surface owner is entitled as against the miner to support, Messrs. Shearman and Redfield, in their work upon the "Law of Negligence," s. 506, say, that "it does not appear to have been

* It is said in Shearman, s. 497, that the true test is, that, although not liable for the natural consequences of withdrawing the support, "yet a man must act with such care and caution that his neighbour shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land." This would seem to be a very difficult test to apply practically.

decided whether the surface owner has a similar right to support for buildings erected by him upon the land, but we think he should have. The miner is undoubtedly liable for damage done to such buildings by his negligence." It does not appear whether the writers are speaking of *lateral* support or not; nor whether they are speaking of *ancient* houses or not. Mr. Wharton says, s. 929, "Wherever the *owner* of the soil has the right, so far as concerns adjoining buildings, so to excavate he must exercise this right with the diligence good builders are in this respect accustomed to employ in similar circumstances;" and he cites Jeffries *v.* Williams and other cases; but Jeffries *v.* Williams was not a case of an *owner*. Here again, also, the meaning of the passage is somewhat obscure.

Mr. Goddard, in his admirable treatise on the "Law of Easements," (2nd ed.), p. 41, after pointing out that it was thought in Rogers *v.* Taylor that there was a distinction between subjacent excavations and adjacent, determines that "support for buildings is an easement which must be acquired, not a natural right. So, also, a man may, after his land has been excavated for twenty years, acquire an easement for support of the adjacent land in addition to his natural right." So far he appears to be dealing with a paramount right, and he does not say what would be the effect of excavating negligently near a modern house. He remarks that "though it is rather beyond the scope of this treatise, the mere fact of contiguity of buildings imposes an obligation on the owners to use due care," and it is submitted that this might be extended to the point in question.

Mr. Gale discusses this question at considerable length (see 5th eds by Gibbons, 419—446). In the case of adjoining buildings he states the law to be, that a man must use no unnecessary violence in removing an encroachment, but, with this limit, is entitled to the free use of his own property; and in the case of excavating near a modern house, p. 446, note, "if the mere removal occasions the damage, he is not liable, however negligent; but if the *manner* of the removal extends his acts beyond the limits of his own property, and is a tresspass upon the plaintiff's land, he is liable."

In the case of adjoining houses there can, I think, be no doubt that a presumption may arise from length of time, or other circumstances, of an absolute right to lateral support;* and then the question of negligence does not arise, for the right to support is paramount; and further, that where this presumption cannot be made, it often becomes a question whether, from the mere fact of contiguity, the defendant has been negligent or not in removing the lateral support, and if he has, he is liable to an action for negligence.

TRESPASS ON IMMOVEABLE PROPERTY.

(Addison on Torts, pp. 355—358.*)*

The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every wilful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact

* "It is doubtful," said Mr. Goddard, 2nd ed; p 187, "whether a lateral support to one building from another can be acquired by prescription. At all events, it may be acquired by grant, express or implied."

either to property or person. "Rights of action of this sort are given," observes Lord Denman, "in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that protection which the law throws around the person; and substantial damages may be recovered in respect of such rights, though no loss or diminution in the value of the property may have occurred."

If the plaintiff's house has been thrown down by reason of the negligence of the defendant or his servants in pulling down an adjoining house, the jury ought not to give as much in damages as would be sufficient to build a new house, but should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one.

The right to recover *mesne profits* is consequential on the right to recover the land. Under the head of *mesne* profits the plaintiff is entitled to recover: 1*st*, compensation for the use and occupation of the premises recovered during the time they were actually or constructively occupied by the defendant; and, 2*ndly*, compensation for any special damage that the plaintiff may be legally entitled to in respect of the trespasses, as if the defendant has shut up an inn (being the premises in question, and has thereby destroyed the custom. The damages under the first head, however, are not confined to the mere rent of the premises; but the jury may give more if they please, as for the plaintiff's trouble in the recovery of the premises, &c.

Wherever the exercise and enjoyment of a right naturally incident to the possession of land, or of a profit *a prendre* or easement, have been obstructed, substantial damages are recoverable, though no actual, perceptible damage has been substained or proved, whenever the repetition of the wrongful act, if uninterrupted and undisturbed, would lay the foundation of a legal right, or be evidence against the existence of the plaintiff's right. A wrongful defilement of a stream is an injury to a right, in respect of which damages are recoverable, although no actual specific damage can be proved. Thus, where certain manufacturers erected works on the bank of a stream, and fouled the water with soap-suds, but no actual damage was proved to have been sustained by the plaintiff, it was held that he was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to the easement of discharging their foul water into the stream. So, where the defendant, a riparian owner, on the banks of a stream which fed a spout, the water of which the plaintiff, in common with the other inhabitants of a certain district, was entitled by custom to use for domestic purposes, abstracted the water to such a degree as to render what remained insufficient for the inhabitants, it was held that the plaintiff might maintain an action, although he had not himself suffered any personal inconvenience. So, too, an action may be maintained by a commoner for an injury done to his common, without proving actual damage; and, whenever there has been an obstruction to the exercise of a right of way, which, if acquiesced in for twenty years, would be evidence against the existence of the right, there is an injury in respect of which damages are recoverable, although there is no proof of actual, pecuniary damage.

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